A **ASEAMBANKERS MALAYSIA BHD & ORS**

v.

SHENCOURT SDN BHD & ANOR

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
LINTON ALBERT JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: W-02-808-2009]
C 27 SEPTEMBER 2013

BANKING: *Banker and customer - Nature of relationship - Whether fiduciary in nature - Whether relationship entirely contractual*

D ***BANKING:*** *Banks and banking business - Loan agreement - Default in repayment - Claim for recovery of loan - Whether borrower could be exempted from liability to repay loan monies to lender - Claim for recovery of loan an entirely separate matter from any claim against lender for damages*

E ***BANKING:*** *Banks and banking business - Loan agreement - Default in repayment - Whether lender has legal obligation to continue to allow borrower to drawdown on loan despite default - Whether lender had wrongfully refused borrower's request for drawdown of facilities - Whether borrower could be exempted from liability to repay loan monies to lender*

F ***CIVIL PROCEDURE:*** *Appeal - Appellate intervention - Finding of facts - Intervention justified where there is insufficient judicial appreciation of evidence - Findings do not accord with probabilities of case*

G ***CIVIL PROCEDURE:*** *Pleadings - Issue not pleaded - Whether court could decide on a cause of action that is not pleaded - Estoppel - Doctrine of - Whether arose*

CONTRACT: *Damages - Burden of proof - Duty on plaintiff to prove facts and amount of damages*

H On 27 June 1996, the appellants, as syndicated lenders, had granted facilities worth RM62.5 million to the first respondent to finance the first respondent's project. The main director and shareholder of the first respondent was the second respondent I and he was also the guarantor of the facilities. Tranche "A" of the bridging loan for the sum of RM28.5 million was for the purpose

of facilitating the redemption of the first respondent's land. Tranche "B" of the bridging loan was for the sum of RM15 million for part-financing of the construction and development of phase 1 of the first respondent's project. Tranche "C" of the bridging loan was for the sum of RM15 million for part-financing of the construction and development of phase 2 of the project. In 1997/1998, problems with its main contractor and the economic crisis led the first respondent to request for the cancellation of the remaining bridging loan in Tranche "C". Subsequently, the facilities were restructured in consideration of a RM2 million fixed deposit pledged by the second respondent. Pursuant to the restructuring agreement ("the 1999 agreement"), Tranche "C" was reinstated, time indulgence was extended to the first respondent and additional facilities amounting to RM17 million were also granted ('the 1999 first restructuring'). Accordingly, drawdowns were also made. In July 2000, the first respondent requested that the sum of RM359,096.33 be disbursed. But the appellants refused to oblige because the first respondent had failed to service the interest payments and also failed to maintain sufficient funds in the Debt Service Reserve Account ('DSRA'). Negotiations ensued and pursuant to a supplementary facilities agreement dated 30 January 2003 ('the 2003 agreement'), the appellants and the first respondent entered into an agreement to restructure the facilities ('the 2003 second restructuring'). Amongst others, a moratorium on interest and principal payments was granted. On 13 December 2004, after the CF was obtained, the first respondent requested from the appellants for a third extension of the moratorium on interest payments. On 12 May 2005, before the appellants could decide on the extension of the moratorium, the first respondent filed its suit no. 665 against the first appellant as the agent for the other appellants. The appellants thus recalled the facilities and filed suit no. 443 against the respondents to recover the monies the appellants had loaned to the first respondent under the facilities. In suit no. 443, the High Court Judge dismissed the appellants' loan recovery claim and held that the respondents were not liable to repay a single cent of the outstanding facilities. All security for the facility was ordered to be released forthwith and discharged, including the security over the project land. The fourth appellant was also ordered to pay RM2 million to the second respondent. In suit no. 665, the first respondent's claim was allowed and the first respondent was awarded damages of RM115.5 million with further damages to be assessed. Hence this appeal by the appellants.

Held (allowing appeal)
Per Abdul Malik Ishak JCA:

(1) No evidence was adduced by the first respondent to prove neither the fact that the respondents had suffered loss nor the quantum of such alleged losses. It is trite law that a plaintiff seeking damages in a court of law has the burden of proving both the fact and the amount of damages before he can recover such damages. (paras 27 & 39)

(2) An appellate court will interfere where the trial court had misdirected itself and applied the wrong principles of law. The appellate court will not hesitate to interfere with findings made by the court of first instance where there was insufficient judicial appreciation of the evidence or where the findings do not accord with the probabilities of the case. (*Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd*; refd, *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors;* refd). (paras 52 & 53)

(3) The parties are bound by their pleadings. The court is not entitled to decide a suit on a matter that is not pleaded. When the trial court decides on an issue that is not pleaded, the judgment can be set aside. (para 67)

(4) The judge had made a finding that there was a breach of fiduciary duties owed by the first appellant to the respondents despite the failure on the part of the respondents to plead the same, and that was fatal. Such findings could not stand and had to be set aside. (para 89)

(5) The relationship between the appellants and the first respondent was not fiduciary in nature. It was a banker-customer relationship. None of the facts alluded to by the judge created a fiduciary relationship. The nature of the banker-customer relationship is entirely contractual. (para 92)

(6) The first respondent claimed that the appellants had wrongfully refused its request for the drawdown of the facilities under the 1999 first restructuring. The first respondent was in arrears of interest and the conditions precedent for drawdown had not been met. By the first respondent's failure to service the interest and the 2003 second restructuring that came into existence, the first respondent should be estopped from raising such stale events to bolster its stand. (paras 128 & 133)

(7) There is no legal obligation on the part of the lender to continue to allow the borrower to drawdown on the loan when the conditions precedent have not been satisfied and when there are defaults on the part of the borrower in relation to its contractual obligations. Further, various clauses in the 1999 agreement were not considered by the judge and these clauses only allowed drawdowns if there were no defaults and if all the conditions precedent had been fulfilled. (paras 177 & 179)

(8) The validity of the loan agreements was never disputed. And it was not disputed that the monies disbursed had been utilised by the first respondent. The first respondent had also benefited from the monies loaned by the appellants to finance Phase 1 of the project to completion. That being the case, there was no justification to totally exempt the respondents from their liability to repay the monies which they had received from the appellants and had used to finance the project. (para 218)

Per Mohamad Ariff Yusof JCA (concurring):

(1) The appeal should be allowed on the ground of error in the application of correct law in relation to the duty of good faith and fair dealing, and error in relation to findings of conscious mismanagement and malicious engineering of a default which findings were not supported by plausible evidence. Further, the judge's decision could not be sustained in view of the two concessions of counsel for the respondents *ie*, (i) that the issue of fiduciary relationship was not pleaded; and (ii) that the loan amounts could be considered at the stage of assessment of damages (*Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor;* refd). A bank's claim for the recovery of a loan is an entirely separate matter from any claim against the bank for damages. (para 337)

Bahasa Malaysia *Translation Of Headnotes*

Pada 27 Jun 1996, perayu-perayu, sebagai pemberi pinjaman bersindiket, telah memberikan kemudahan bernilai RM62.5 juta kepada responden pertama untuk membiayai projek responden pertama. Pengarah dan pemegang saham utama responden pertama adalah responden kedua yang juga penjamin kemudahan tersebut. Tranche "A" pinjaman penyambung bagi amaun RM28.5 juta adalah bagi tujuan memudahkan penebusan tanah responden

pertama. Tranche "B" pinjaman penyambung adalah untuk amaun RM15 juta bagi pembiayaan sebahagian daripada pembinaan dan pembangunan fasa 1 projek responden pertama. Tranche "C" pinjaman penyambung adalah untuk amaun RM15 juta bagi pembiayaan sebahagian pembinaan dan pembangunan fasa 2 projek. Pada 1997/1998, beberapa masalah dengan kontraktor utama dan berlakunya krisis ekonomi menyebabkan responden pertama meminta pembatalan baki pinjaman penyambung di Tranche "C." Seterusnya, kemudahan distrukturkan semula sebagai mempertimbangkan deposit tetap RM2 juta yang digadaijanjikan oleh responden kedua. Menurut perjanjian penstrukturan semula ('perjanjian 1999'), Tranche "C" telah dikembalikan, kelonggaran masa telah dilanjutkan kepada responden pertama dan kemudahan-kemudahan tambahan berjumlah RM17 juta juga telah diberikan ('penstrukturan semula pertama 1999'). Sewajarnya, pengeluaran juga telah dibuat. Pada Julai 2000, responden pertama telah meminta amaun berjumlah RM359,096.33 dikeluarkan bayaran. Tetapi perayu-perayu enggan berbuat demikian atas sebab responden pertama telah gagal melaksanakan perkhidmatan bayaran faedah dan juga gagal untuk mengekalkan dana yang mencukupi dalam Akaun Rizab Pembayaran Akaun ('ARPA'). Perundingan dibuat dan menurut perjanjian kemudahan tambahan bertarikh 30 Januari 2003 ('perjanjian 2003'), perayu dan responden pertama telah memasuki satu perjanjian untuk menstruktur semula kemudahan ("menstruktur semula kedua 2003"). Antara lain, moratorium ke atas faedah dan pembayaran prinsipal telah diberikan. Pada 13 Disember 2004, selepas CF diperolehi, responden pertama telah meminta perayu untuk satu sambungan lanjutan moratorium ketiga berkenaan bayaran faedah. Pada 12 Mei 2005, sebelum perayu boleh membuat keputusan berkenaan lanjutan moratorium, responden pertama telah memfailkan guaman no. 665 terhadap perayu pertama sebagai ejen untuk perayu yang lain. Perayu oleh itu telah memanggil balik kemudahan dan memfailkan guaman no. 443 terhadap responden-responden untuk mendapatkan balik wang yang telah perayu pinjamkan kepada responden pertama di bawah kemudahan. Dalam guaman no. 443, Hakim Mahkamah Tinggi ('hakim') telah menolak tuntutan pemulihan pinjaman dan memutuskan bahawa responden-responden tidak bertanggungjawab untuk membayar balik setiap sen daripada kemudahan yang belum dijelaskan. Segala sekuriti kemudahan telah diperintahkan untuk dikeluarkan dan dilepaskan

serta merta, termasuk sekuriti ke atas tanah projek. Perayu keempat diperintahkan membayar RM2 juta kepada responden kedua. Dalam guaman no. 665, tuntutan responden pertama telah dibenarkan dan responden pertama telah diawardkan gantirugi RM115.5 juta dengan gantirugi selanjutnya untuk dinilaikan. Oleh itu, rayuan ini oleh perayu-perayu.

Diputuskan (membenarkan rayuan)
Oleh Abdul Malik Ishak HMR:

(1) Tiada keterangan dikemukakan oleh responden pertama untuk membuktikan bahawa responden telah mengalami kerugian atau kuantum kerugian yang didakwa itu. Adalah undang-undang mantap bahawa plaintif yang menuntut gantirugi di mahkamah undang-undang mempunyai beban membuktikan fakta dan amaun gantirugi sebelum plaintiff boleh mendapatkan gantirugi itu.

(2) Mahkamah rayuan boleh campurtangan di mana mahkamah perbicaraan telah tersalah arah dan menggunapakai prinsip undang-undang yang salah. Mahkamah rayuan tidak akan meragui untuk campurtangan dengan dapatan mahkamah perbicaraan apabila terdapat pertimbangan kehakiman berkenaan keterangan yang tidak memadai atau di mana dapatan tidak serasi dengan kebarangkalian kes itu *(Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd;* dirujuk, *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors;* dirujuk).

(3) Pihak-pihak yang terlibat adalah terikat dengan pliding yang diberikan. Mahkamah tidak mempunyai hak untuk memutuskan guaman atas perkara yang tidak diplidkan. Apabila mahkamah perbicaraan membuat keputusan mengenai isu yang tidak diplidkan, penghakiman boleh diketepikan.

(4) Hakim bicara telah membuat dapatan bahawa terdapat pelanggaran kewajipan fidusiari oleh perayu pertama kepada responden walaupun pihak responden gagal untuk memplid perkara yang sama, dan itu adalah fatal. Dapatan sebegitu tidak boleh bertahan dan harus diketepikan.

(5) Hubungan di antara perayu dan responden pertama bukan bersifat fidusiari. Ia adalah hubungan bank dan pelanggan. Tiada fakta-fakta yang dirujukkan oleh hakim yang telah melahirkan hubungan fidusiari. Sifat hubungan bank dan pelanggan adalah kontraktual.

(6) Responden pertama mendakwa bahawa perayu telah secara salah meminta pengeluaran kemudahan di bawah penstrukturan semula 1999 yang pertama. Responden pertama mempunyai kepentingan tertunggak dan syarat-syarat bagi pengeluaran tidak dipenuhi. Oleh kerana responden pertama gagal membayar faedah dan penstrukturan semula kedua 2003 yang wujud, responden pertama diestop daripada membangkitkan peristiwa basi untuk menegakkan pendiriannya.

(7) Tiada obligasi undang-undang dari pihak pemberi pinjaman untuk terus membenarkan pengeluaran ke atas pinjaman kepada peminjam di mana syarat-syarat yang diberikan tidak dipenuhi dan di mana terdapat keingkaran dari pihak peminjam berhubungan obligasi-obligasi kontraktual. Selanjutnya, beberapa klausa di dalam perjanjian 1999 tidak dipertimbangkan oleh hakim dan klausa-klausa ini hanya membenarkan pengeluaran jika tiada keingkaran dan jika segala syarat telah ditepati.

(8) Kesahihan perjanjian pinjaman tidak pernah dipertikaikan. Ia juga tidak dipertikaikan bahawa wang yang telah dikeluarkan telah digunakan oleh responden pertama. Responden pertama juga telah mendapat manfaat daripada wang yang telah dipinjamkan oleh perayu sebagai pembiayaan Fasa 1 projek sehingga penyempurnaan. Dengan itu, tiada justifikasi untuk mengecualikan responden daripada tanggungjawab mereka untuk membayar balik wang yang telah mereka terima daripada perayu dan telah digunakan untuk membiayai projek itu.

Oleh Mohamad Ariff Yusof HMR (menyetujui):

(1) Rayuan harus dibenarkan atas alasan kekhilafan dalam penggunaan undang-undang yang betul berhubungan kewajipan niat baik dan cara urusan yang adil, dan kekhilafan berhubungan penemuan terdapat salah urus dan pengaturan niat jahat yang didakwa adalah satu kemungkiran kewajipan, di mana dapatan tidak disokong oleh keterangan munasabah. Selanjutnya, keputusan hakim tidak boleh bertahan memandangkan dua konsesi responden iaitu (i) bahawa isu perhubungan fidusiari tidak diplidkan dan (ii) bahawa amaun pinjaman boleh dipertimbangkan pada peringkat pentaksiran gantirugi (*Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor*, dirujuk). Tuntutan sebuah bank untuk pemulihan pinjaman adalah satu perkara berasingan sepenuhnya daripada apa-apa tuntutan terhadap bank untuk gantirugi.

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors [1995] 4 CLJ 551 CA ***(refd)***

Affin Bank Bhd v. Datuk Ahmad Zahid Hamidi [2005] 1 CLJ 521 HC ***(refd)***

AIB Group (UK) plc (formerly Allied Irish Banks plc and AIB Finance Ltd) v. Martin and Another [1999] All ER (D) 270 ***(refd)***

Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce International Bank Ltd [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565 ***(refd)***

Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan [2003] 4 CLJ 785 CA ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2010] 1 LNS 206 HC ***(refd)***

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

Bristol and West Building Society v. Mothew [1998] Ch 1 ***(refd)***

Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors [2004] 1 CLJ 781 CA ***(refd)***

California, Standard Wire And Cable Company v. Ameritrust 697 F Supp 368 (1988) ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Delta Enterprises Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor [2005] 1 CLJ 501 CA ***(refd)***

Equitable Life Assurance Society v. Hyman [2000] 3 All ER 961 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) And Others [1998] 1 WLR 896 ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***

Kian Lup Construction v. HongKong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Kirke La Shelle Company v. Paul Armstrong Company (1933) 263 NY ***(refd)***

Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 SC ***(refd)***

KMC Co Inc v. Irving Trust Company 757 F 2d 752 ***(refd)***

A *Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA* ***(refd)***
Lever Brothers Limited And Others v. Bell And Another [1931] 1 KB 557 ***(refd)***
Lim Chee Holdings Sdn Bhd v. RHB Bank Bhd [2005] 4 CLJ 305 CA ***(refd)***
B *Lim Tiong Huai v. Wang Swee Teck berniaga sebagai Wang Plumbering & Electric Co [2003] 1 LNS 564 HC* ***(refd)***
Megaro v. Di Popolo Hotels Ltd [2007] EWCA Civ 309 ***(refd)***
Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (Trading as Medirest) [2013] EWCA Civ 200 ***(refd)***
Moorgate Mercantile Co Ltd v. Twitchings [1976] 1 QB 225; [1975] 3 All
C *ER 314 CA* ***(refd)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***
Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 557; [1989] 1 CLJ (Rep) 116 SC ***(refd)***
D *Murphy and Another v. HSBC plc (formerly known as the Midland Bank plc) and Another [2004] EWHC 467 (Ch)* ***(refd)***
Narayanan v. Kannamah [1993] 4 CLJ 389 HC ***(refd)***
Ng Giap Hon v. Westcomb Securities Pte Ltd and Others [2009] 3 SLR 518 ***(refd)***
Nusantara Network Sdn Bhd v. Malaysia Building Society Bhd [2010] 1
E *LNS 152 HC* ***(refd)***
Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***
Panwell Pte Ltd & Anor v. Indian Bank (No 2) [2002] 4 SLR 963 ***(refd)***
Perwira Habib Bank (M) Bhd v. Hong Huat Holdings Sdn Bhd & Ors [1991] 2 CLJ 906; [1991] 1 CLJ (Rep) 373 SC ***(refd)***
F *Popular Industries Ltd v. Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133 HC* ***(refd)***
Prismanet (M) Sdn Bhd v. Perwira Affin Merchant Bank Berhad & 3 Ors [1998] 1 LNS 48 HC ***(refd)***
Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah)
G *Sdn Bhd [2013] 6 CLJ 958 CA* ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***
Ria Enterprise & Ors v. MBf Finance Bhd [2001] 1 CLJ 687 HC ***(refd)***
Rogers v. Tecumseh Bank 756 P 2d 1223 ***(refd)***
H *Rosita Baharom & Anor v. Sabedin Salleh [1992] 1 CLJ 180; [1992] 3 CLJ (Rep) 497 HC* ***(refd)***
Royal and Sun Alliance Insurance plc v. Dornoch Ltd and others [2005] 1 All ER (Comm) 590 ***(refd)***
S Manickam & Ors v. Ismail Mohamad & Ors [1996] 1 LNS 117 HC
I ***(refd)***
Seven Seas Industries Sdn Bhd v. Philips Electronics Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
Sri Alam Sdn Bhd v. United Malayan Banking Corporation Berhad [2011] 1 LNS 384 ***(refd)***
Standard Wire & Cable Company v. Ameritrust Corporation 697 F Supp 368 [1988] US District LEXIS 11251 ***(refd)***
State National Bank of El Paso v. Farah Manufacturing Company, Inc 678 SW 2d 661 Tex Civ App 1984 ***(refd)***
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others [1985] 2 All ER 947 PC ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors and Other Appeals [1997] 2 CLJ 607 CA ***(refd)***
The Chartered Bank v. Yong Chan [1974] 1 LNS 178 FC ***(refd)***
Union Eagle Ltd v. Golden Achievement [1997] AC 514 ***(refd)***
Walford and Others v. Miles and Another [1992] 2 AC 128 ***(refd)***
Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1992] 1 CLJ 180; [1992] 3 CLJ (Rep) 497 HC ***(refd)***
Wong See Leng v. C Saraswathy Ammal [1954] 1 LNS 133 CA ***(refd)***
Yam Seng Pte Limited (A company registered in Singapore) v. International Trade Corporation Limited [2013] EWHC 111(QB) ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 5(1)

Restatement (Second) of Contracts [US], s. 205
Uniform Commercial Code [US], ss. 1-201, 1-203

Other source(s) referred to:
Encyclopaedia of Banking Law, Binder 1A, paras 3224, 3225, 3407
James O'Donovan, *Lender Liability*, paras 317 & 326
Chitty on Contracts, 29th edn, vol 1, p 1-020
William Blair QC, *Banks, Liability and Risk*, 3rd edn, p 40

For the appellants - Yoong Sin Min (Kong Chia Yee & Cheah Faan Jin with her); M/s Shook Lin & Bok
For the respondents - Tan Keng Teck (Chai Jai Hui & Lim Kian Leong with him); M/s Lim Kian Leong & Co

[Appeal from High Court, Kuala Lumpur; Suits No: D2-22-665-2005 & D2-22-443-2006]

Reported by Amutha Suppayah

A

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

B **[1]** After a full trial of two civil suits that were heard together which lasted for 21 days, the High Court allowed the first respondent's claim and dismissed the appellants' loan recovery claims. The High Court also ordered that the appellants pay the respondents damages totalling RM117.5 million with further C damages to be assessed. The High Court also dismissed the appellants' claims for recovery of the monies loaned to the respondents.

[2] Civil Suit No: D2-22-443-2006 carried the appellants' loan D recovery claims while Civil Suit No: D2-22-665-2006 constituted the first respondent's claim. These were the details of the two civil suits that were consolidated and heard together.

[3] The decision of the High Court for these two civil suits may conveniently be summarised in this way: E

(i) The appellants' loan recovery claims – Suit No: 443

(a) the appellants' loan recovery claims were dismissed and the counter claim of the respondents was allowed;

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(b) the respondents were held not liable to repay a single cent of the outstanding facilities which had financed the development of the first respondent's land known as "Galaxy Ampang" comprising of a shopping centre and an office block ("the project");

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(c) all security for the facility was ordered to be released forthwith and discharged, including the security over the project land; and

H (d) the fourth appellant to pay RM2 million to the second respondent.

(ii) The first respondent's claim – Suit No: 665

(a) the first respondent's claim was allowed;

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(b) the first respondent was awarded damages of RM115.5 million with further damages to be assessed;

(c) the damages awarded included the appellants having to repay the Malaysian Alliance Assurance Berhad's ("MAA's") loan; and

(d) general damages and the balance of the first appellant's claim to be assessed by the court.

The Facts

[4] On 27 June 1996, the appellants, as syndicated lenders, had granted facilities worth RM62.5 million to the first respondent to finance the first respondent's project. The main director and shareholder of the first respondent is the second respondent and he is also the guarantor of the facilities. The first appellant played a major role. As security agent, all security for the facilities were given to the first appellant including an assignment over the project land and a debenture.

[5] Pursuant to the terms of the first letter of offer and the facility agreement, the first respondent agreed, *inter alia*:

(a) that the revolving credit facility of RM4 million was to be utilised by the first respondent as its working capital;

(b) that Tranche "A" of the bridging loan for the sum of RM28.5 million was for the purpose of facilitating the redemption of the first respondent's land from Bank Kerjasama Rakyat Malaysia Berhad;

(c) that Tranche "B" of the bridging loan was for the sum of RM15 million for part-financing of the construction and development of Phase 1 of the first respondent's project; and

(d) that Tranche "C" of the bridging loan was for the sum of RM15 million for part-financing of the construction and development of Phase 2 of the project.

[6] Sometime in 1997/1998, the first respondent had problems with its main contractor compounded by the bad economic crisis. This prompted the first respondent to request for the cancellation of the remaining bridging loan in Tranche "C" amounting to RM15 million which was initially intended to finance the building of the office block of the project. With the gloomy economic scenario, the project stalled.

[7] On 26 April 1999, there was a letter of offer by the fourth appellant which was accepted by the second respondent wherein the fourth appellant will participate in the proposed restructuring of the facilities in consideration of the RM2 million fixed deposit receipts pledged by the second respondent solely in favour of the fourth appellant. The second respondent then placed the fixed deposit with the fourth appellant.

[8] On 22 July 1999, pursuant to the first respondent's request, the first appellant issued a letter of offer which was duly accepted by the first respondent to restructure the facilities.

[9] On 7 Disember 1999, the appellants and the first respondent entered into a restructuring agreement ("the 1999 agreement") where Tranche "C" amounting to RM15 million was reinstated. Apart from time indulgence being extended to the first respondent, additional facilities amounting to RM17 million were also granted ("the 1999 first restructuring"). Accordingly, drawdowns were also made.

[10] In July 2000, the first respondent requested that the sum of RM359,096.33 be disbursed. But the appellants refused to oblige because the first respondent had failed to service the interest payments and also failed to maintain sufficient funds in the debt service reserve account ("DSRA"). The respondents admitted that they were in arrears and negotiations ensued between the parties. At that point of time, the interest due was RM1.4 million.

[11] In 2002, there was a request by the respondents to the appellants to allow further restructuring of the facilities. And on 15 August 2002, MAA only agreed to give partial financing since Bank Negara did not allow full refinancing. The parties then continued to negotiate.

[12] Pursuant to a supplementary facilities agreement dated 30 January 2003 ("the 2003 agreement"), the appellants and the first respondent entered into an agreement to restructure the facilities ("the 2003 second restructuring") where the parties agreed that:

(a) the outstanding facilities were reduced to RM38.5 million and the sum of RM8.5 million was to be paid immediately from the MAA loan;

(b) in return, the appellants agreed to share their security with MAA on a *pari passu* basis; and

(c) a moratorium on interest and principal payments was granted and this meant that the interest was only to be paid starting from 30 January 2004 (one year later) and the principal repayment started only in 2007 (four years later).

[13] MAA also granted the first respondent credit facilities of RM35 million.

[14] On 24 May 2004, the respondents requested for and the appellants and MAA granted an additional loan of RM2,476,728 ("additional payments") to assist the respondents in making payments to the statutory bodies to procure the certificate of fitness for occupation ("CF") for Phase 1 of the project. The appellants also allowed a second extension of one year to the moratorium granted for interest payments from 30 January 2004 to 30 January 2005.

[15] On 13 December 2004, after the CF was obtained, the first respondent requested from the appellants for a third extension of the moratorium on interest payments for a further one year, from 30 January 2005 to 30 January 2006.

[16] On 12 May 2005, before the appellants could decide on the extension of the moratorium, the first respondent filed its Suit No: 665 against the first appellant as the agent for the other appellants.

[17] At this juncture, it must be mentioned that other than the RM8.5 million paid from the MAA loan in 2003, the respondents have made no payments since 2000.

[18] Sometime in March 2006, the appellants recalled the facilities and filed Suit No: 443 against the respondents to recover the monies the appellants had loaned to the first respondent under the facilities.

[19] As stated earlier, both the suits were heard together. And after a full trial, on 6 May 2009, the High Court gave judgment in favour of the respondents in both the suits.

[20] On 24 June 2009, the appellants obtained a stay of the judgment pending appeal to this court.

Analysis

[21] Care will be taken to ensure that all the relevant points raised by the parties will be alluded to in this judgment. It must be stated, at the outset, that the Central Bank which is Bank Negara Malaysia ("BNM"), has been entrusted to regulate and supervise the banking system in the country. The Banking and Financial Institutions Act 1989 ("BAFIA") and the BNM guidelines put the banking system in an orderly fashion. In *Affin Bank Bhd v. Datuk Ahmad Zahid Hamidi* [2005] 1 CLJ 521; [2005] 3 MLJ 361, I had occasion to say at p. 372, that:

> (36) It cannot be doubted that the BNM guidelines were put in place in order to prevent any debt from spiralling out of control. It is a matter of policy and it is for the good of the country that all the banks in the country should adhere to the BNM guidelines since Bank Negara being the Central Bank is the regulatory body entrusted to put in place and implement the minimum standards for classification of accounts, income recognition and loan loss provisioning.

Quantum Of Damages

[22] Madam Yoong Sin Min for the appellants submitted that the entire course of the trial proceeded on the issue of liability and no evidence was led in regard to the quantum of damages. According to her, it came, "as a shock to us" when the High Court Judge awarded damages. She drew our attention to pp. 632 to 633 of the appellants' core bundle (2) ("ACB (2)") where the following exchange took place:

> Ms Yoong
>
> Can I have Court's direction as to whether we can confine it to question of liability and take question of damages later?
>
> Court
>
> For practical purposes we confine to question of liability first and take question of damages later.

[23] Mr Tan Keng Teck for the respondents, by way of a rebuttal, pointed out that during the course of the trial and after considering the submissions of the respective parties' counsel, it became apparent that the first respondent suffered quantifiable damages, which were within the contemplation of the appellants.

It was on this basis, according to Mr Tan Keng Teck, that the High Court Judge exercised her judicial discretion to partially award the first respondent's proven liquidated losses, in particular:

(a) The end purchasers' liquidated and ascertained damages suffered by the first respondent amounting to RM80.5 million. According to Mr Tan Keng Teck, this claim was proven through the testimony of Rozidin bin Masari ("DW1") who agreed that the aforesaid liquidated and ascertained damages ("LAD") exposure suffered by the first respondent and exh. "P28" also clearly showed that the appellants were fully aware of the first respondent's exposure.

(b) The repayment of the MAA loan of RM35 million which excluded the capitalised interest and default interest. According to Mr Tan Keng Teck, this loan was forced to be taken by the first respondent due to the appellants' unreasonable refusal to allow any further drawdown of the facilities in the year 2000 to complete the project which was approximately 85% completed. And according to Mr Tan Keng Teck, Teoh Hock Soon ("PW3") has confirmed that the first respondent is now in default of its loan obligation to MAA.

[24] Mr Tan Keng Teck further submitted that in respect of the first respondent's remaining claims, the High Court Judge had ordered that such claims are to be assessed by the senior assistant registrar.

[25] In regard to the appellants' loan recovery claims in Suit No: 443, Mr Tan Keng Teck pointed out that the High Court Judge had dismissed the appellants' claims with costs and also ordered the release of all securities given by the respondents which include the refund of the fixed deposit of RM2 million to the second respondent.

[26] Madam Yoong Sin Min submitted that in allowing the first respondent's claim, the High Court Judge awarded a specific sum of damages of RM117.5 million comprising of the following:

(a) RM80.5 million for the end-purchasers' LAD;

(b) RM35 million for the MAA loan;

(c) RM2 million from the fourth appellant to the second respondent; and

(d) the High Court Judge also ordered that further damages be assessed.

[27] The exchange that took place between Madam Yoong Sin Min and the bench as alluded to earlier showed that no evidence was adduced by the first respondent to prove neither the fact that the respondents had suffered loss nor the quantum of such alleged losses. And this is the remarkable thing about the High Court judgment, lamented Madam Yoong Sin Min.

[28] It must be borne in mind that learned counsel for the respondents did not address us on the issue that the trial had proceeded only on the issue of liability and that damages was to be assessed later, only if liability of the appellants was proven.

[29] Before the High Court, the extent of the respondents' submissions on the quantum of damages can be seen at pp. 4571 to 4572 of the appeal record at jilid 44 and it was to this effect:

> In addition, in respect of Suit No: D2-22-665-2005, SSB had claim for general damages to be assessed by this Honourable Court. However, during the course of this trial, SSB has proven part of its losses suffered by the breaches by ASEAM and Lenders, in particular:
>
> (a) the end purchasers' liquidated and ascertained damages claims suffered by SSB amounting to approximately RM80.5 million, which was proven through the testimony of DW1 who agreed the aforesaid LAD exposure suffered by SSB (during cross-examination); and
>
> (b) the repayment of the MAA loan of RM35 million (excluding the capitalised interest and default interest) which DW3 has admitted that MAA is now intending to initiate an action against SSB.
>
> As such, SSB humbly prays that this Honourable Court grants a specific monetary compensation of RM115.5 million.

[30] In making such a submission, learned counsel for the respondents did not venture to show any specific witness testimony and did not refer to any documentary evidence.

[31] By way of a response, learned counsel for the appellants submitted that the proposed compensation sum has not been established and, in any event, it has got to be part of damages before it is assessed and that would be dependent on the question of whether the first respondent can prove its claim on liability.

[32] Notwithstanding the lack of proof as to the quantum of damages, Madam Yoong Sin Min pointed out that the High Court Judge went on to conclude at p. 127 of the appeal record, at jilid 2/44 in this way:

> The plaintiff had proven part of its losses suffered by the breaches by the Defendant and Co-Lenders, in particular:
>
> (a) the end purchasers' liquidated and ascertained damages claims suffered by the plaintiff amounting to approximately RM80.5 million, which was proven through the testimony of DW1 who agreed during cross-examination, that the aforesaid LAD exposure was suffered by the plaintiff; and
>
> (b) the repayment of the MAA loan of RM35 million (excluding the capitalised interest and default interest) which DW3 had admitted that MAA is now intending to initiate an action against the plaintiff.
>
> In that connection, this court grants the plaintiff a specific monetary compensation of RM115.5 million.

[33] Madam Yoong Sin Min submitted that she was mystified as to where such "admission" of DW1 could be found because there was no such admission. According to Madam Yoong Sin Min, in her written submission, that:

> It has now come to light that the Respondents were relying on the testimony of DW1 where the Respondents' counsel had referred DW1 to the disputed Internal Memo. DW1's answers were therefore in response to the counsel of the Respondents asking DW1 to read what was in the disputed Internal Memo (Appendix 62 to Respondents' Submissions in Reply). It was not DW1's confirmation of the contents therein).

[34] At this juncture, it is ideal to reproduce verbatim the evidence of DW1 as seen at p. 799 of the appeal record at jilid 9/44. I shall do so now. It reads as follows:

> **Counsel**
>
> Clause 4 - page 974. Would you agree that at the material time, Shencourt had late delivery damages (to) be paid to its end purchasers?
>
> **DW1**
>
> Yes.
>
> **Counsel**
>
> What was Shencourt's total net exposure as at 31.3.2000?

DW1

RM52.1 million LAD.

Counsel

And thereafter what would be Shencourt's annual damages to end purchasers.

DW1

RM14.2 million p.a.

[35] Under re-examination, DW1 confirmed that he had not seen the internal memorandum prior to the trial and that the contents of the document were not accurate.

[36] Not to be outwitted, the respondents also attempted to fortify its claim of the RM115.5 million damages by referring to a letter dated 9 May 2001 by the first respondent (see pp. 2556 to 2557 of the appeal record at jilid 27/44). That letter merely refers to a "projected" LAD (see para. (f) at p. 2557). That letter, according to Madam Yoong Sin Min, cannot be proof of what the liquidated damages are, and whether the appellants are wholly responsible for the same. Madam Yoong Sin Min further submitted that the High Court Judge "never referred to this letter for her finding on damages".

[37] Madam Yoong Sin Min also submitted that the High Court Judge failed to consider that the project was already delayed in 1997 due to the financial crisis and the problems with the contractor, and that the LAD had already arisen prior to any allegations against the appellants, which only arose in 2000. And according to Madam Yoong Sin Min, this was admitted by the respondents' own witness by the name of Dato' Lee Kam Yoong ("PW1") (see p. 581 of the appeal record at jilid 7/44):

Counsel

In fact, if plaintiff had completed project in 1998 there will be no LADs.

PW1

Yes.

Counsel

See page 613 Bundle D para 3.1.1 - 'It will be difficult ...'. Do you agree with the statement that potential purchaser after 1997 would have negative perception of the project?

PW1

Yes. I agree.

Counsel

So when I 1st posed question whether your problem arose prior to 1997, does not this report show the LAD problem and problem of sale of the units in the project arose from plaintiff's inability to complete project in 1998?

PW1

Partially true.

Counsel

But you do confirm if project was completed in 1998 none of the LAD would be a problem.

PW1

Yes. I agree.

[38] Incidentally, the first respondent's own witness, Cheah Ah Jin @ Cheah Teik Jin ("PW2"), had also admitted to the same factual scenario.

[39] It is trite law that a plaintiff seeking damages in a court of law has the burden of proving both the fact and the amount of damages before he can recover such damages (*Popular Industries Ltd v. Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1989] 3 MLJ 360).

[40] There must be sufficient data for the court to assess damages. And there must be proof of the damages claimed and not just a mere assertion (*Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2010] 1 LNS 206; [2011] 5 MLJ 1; *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229; and *Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan* [2003] 4 CLJ 785; [2004] 1 MLJ 411).

[41] In regard to the measure of damages, I had this to say in *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958; [2013] 4 MLRA 68, at pp. 88 to 89:

> (74) According to Asquith LJ in *Hadley and Another v. Baxendale and Others* [1854] 9 Ex 341, 'the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed'.

(75) What Lord Blackburn said in the context of tort and contract in the case of *Livingstone v. The Rawyards Coal Company* [1880] 5 App. Cas. 25, at page 39, as to the measure of damages ought to be reproduced. There, His Lordship said:

> ... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

(76) This short and brief statement of the law by Lord Blackburn has been approved and applied in the following cases:

(a) *Banco de Portugal v. Waterlow And Sons, Limited, Waterlow And Sons, Limited v. Banco de Portugal* [1932] AC 452, HL, at 474, per Viscount Sankey LC;

(b) *Monarch Steamship Co., Limited v. Karlshamns Oljefabriker (A/B)* [1949] AC 196, HL, at 221, per Lord Wright;

(c) *British Transport Commission v. Gourley* [1956] AC 185, at 197, per Earl Jowitt;

(d) *Koufos v. C. Czarnikow Ltd* [1969] 1 AC 350, HL, at 420, per Lord Upjohn;

(e) *General Tire & Rubber Co v. Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819, HL, at 824C, per Lord Wilberforce;

(f) *Swingcastle v. Gibson (A Firm)* [1991] 2 AC 223, HL, at 232D, per Lord Lowry; and

(g) *Alfred McAlpine Construction Ltd v. Panatown Ltd* [2001] 1 AC 518, HL, at 562G, per Lord Jauncey of Tullichettle.

(77) *While Lord Diplock defined it differently in Albacruz (Cargo Owners) v. Albazero (Owners)* [1977] AC 774, HL, at 841C in this way:

> ... to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so.

[42] Madam Yoong Sin Min strenuously submitted along the following lines:

(a) that as far as the LAD was concerned, the High Court Judge failed to consider that the first respondent have failed to completely prove any particulars of the LAD sum;

(b) that in relation to the RM35 million MAA loan, the High Court Judge ordered the appellants to pay that sum but yet failed to consider that the first respondent failed to produce the following salient and supporting documents:

(i) the statement of accounts and the outstanding sum; and

(ii) the documents to show that disbursements had been made.

(c) that the High Court Judge failed to consider that the first respondent could have mitigated its losses if it had instituted the action herein against the appellants in the year 2000 when the appellants had refused drawdown under the facilities bearing in mind that:

(i) the feasibility reports showed that the LAD was then in the region of RM11 million in 2000; and

(ii) there would certainly be no MAA loan.

[43] Madam Yoong Sin Min boldly submitted that it would be ridiculous for the appellants to repay the loan which the first respondent secured from another financier.

[44] With respect, the grounds of judgment of the High Court Judge revealed that she had not considered whether the alleged damages suffered by the first respondent were in fact caused by the actions of the appellants. The financial crisis and the problems with the main contractor that were alluded to earlier were responsible for the delay in the project and this was aggravated by the mounting LAD. All these, according to Madam Yoong Sin Min, did not catch the eye of the High Court Judge.

[45] It is pertinent to note that the first respondent's own witness, PW2, had admitted as to the financial crisis that besieged the contractor. The testimony of PW2 went like this (see Tab 2, ACB (2) at p. 635):

Counsel

Would it be correct to say because at that time, the contractor had money problem and that's why the project was delayed and project was not completed?

PW2

Yes.

Counsel

Were these problems in completing the project 97-98?

PW2

Yes.

Counsel

Is it also correct to say there were LAD problems and so there were LAD claims?

PW2

Yes.

[46] And because of the economic crisis, the first respondent's letter dated 18 December 1997 requesting for the cancellation of Tranche "C" as the project had to be revised.

[47] The feasibility reports were not encouraging. It stated that:

(a) the project was suspended since 1997 because of financial difficulties;

(b) the first respondent's main contractor, PNCK, was unable to complete the project because of financial difficulties; and

(c) there was approximately RM11 million worth of the LAD that had accrued (see p. 130 of the appellants' core bundle (1) ("ACB(1)").

[48] All these clearly showed that the problems and the delay with the project had occurred way back in 1997 through no fault of the appellants.

[49] It must be recalled to mind that the High Court Judge had awarded RM80.5 million for the LAD which were allegedly based on the testimony of DW1. But DW1 purportedly agreed that the LAD exposure was that sum during cross-examination. It must be emphasised, at this juncture, that the High Court Judge failed to consider the following factors:

(a) that DW1 never made such an admission;

(b) that the first respondent did not plead the particulars of the LAD;

(c) that, according to Madam Yoong Sin Min, the notes of evidence had not been finalised when the High Court Judge delivered the judgment and that being the case, the High Court Judge had not stated in what context the supposed admission was made by DW1;

(d) that DW1 is only a banker and had no actual knowledge of the quantum of the LAD that was due; and

(e) that there was no other evidence that was adduced to support the sum of RM80.5 million as the LAD.

[50] The sum total of it all would be this. That there was no proof of damages advanced by the first respondent.

[51] In regard to the RM2 million which the fourth appellant has to pay to the second respondent, it is the stand of the appellants that the second respondent has no cause of action against the fourth appellant based on the pleadings. At any rate, the second respondent had already requested the fourth appellant to uplift the fixed deposit ("FD") amounts to settle the interest due from the first respondent to the fourth appellant from November 2000 to June 2007. Madam Yoong Sin Min rightly pointed out that the second respondent ought not to be awarded the sum of RM2 million as the FD had already been utilised to service the loan.

Appellate Intervention

[52] An appellate court will interfere where the trial court had misdirected itself and applied the wrong principles of law. The appellate court will not hesitate to interfere with findings made by the court of first instance where there was insufficient judicial appreciation of the evidence or where the findings do not accord with the probabilities of the case.

[53] In *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2010] 1 MLJ 85, at pp. 106 to 107, I set out instances when appellate interference is warranted:

> [64] Finally, I will now say something about the finding of facts by the High Court which has been alluded to by my learned brother Low Hop Bing, JCA. An appellate court will not readily interfere with the finding of facts arrived at by the trial court. It is trite law that the primary task of evaluation of the evidence and the function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. In this appeal

it is to the High Court. And the appellate court is under a duty to intervene with the finding of facts by the trial court where the trial court has so fundamentally misdirected itself that a reasonable man may safely say that no reasonable court which had properly directed itself and asked the right questions would have arrived at the same conclusion (*Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 2 MLJ 373 at p. 379; [1997] 3 AMR 2430 (CA) at p. 2440D-E; *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153; [1995] 2 AMR 1353 (CA) at pp. 171H-173A; *Associated Tractors Sdn Bhd v. Woo Sai Wa* [1997] 5 MLJ 441 at p. 450F-H; and *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 3 AMR 410; [2006] 2 CLJ 337 (CA) at p. 417, at para. 18).

[65] *The case of Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 2 AMR 6; [2003] 1 CLJ 585 (CA), sets out certain categories in which appellate interference may be warranted. It would be ideal to set out, briefly, instances where the finding of facts by the trial court was reversed by the appellate court:

(a) non-consideration or insufficient or no judicial appreciation of material evidence constitutes insufficient judicial appreciation of relevant evidence" (*Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1 (FC));

(b) where the audio visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord well with the probabilities of the case (*Len Min Kong v. United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478 at p. 486C-D; [1998] 3 AMR 2641 at p. 2655; [1998] 2 CLJ 879 (CA); *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd and Other Appeals* [2004] 4 MLJ 105; [2004] 6 AMR 319; [2004] 4 CLJ 282 (CA); and *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309 (FC));

(c) where the facts were misapprehended and the wrong principles of law were blindly applied by the trial judge (*Lim Chor Ching & Anor v. Idris bin Abdul Karim and anor appeal* [1998] 3 AMR 3182; [1998] 3 CLJ Supp 145 at p. 156 a-g);

(d) where there was a failure to assess the evidence with the documents at hand and view it against the probabilities of the case (*Loo Hon Kong v. Loo Kim Lim @ Loo Kim Leong* [2004] 4 AMR 591; [2004] 4 CLJ 1 (CA));

(e) where there was a failure to consider the relevancy of contemporaneous documents (*Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (SC) at p. 37); and

(f) where the finding of facts was contrary to the documentary evidence (*Associated Tractors Sdn Bhd v. Woo Sai Wa* [1997] 5 MLJ 441, at p. 451C).

[54] PS Gill FCJ in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; [2006] 5 MLJ 1, at p. 10, spoke about appellate intervention in this way:

(18) We have had to reassess the entire facts of this case, as there was precious little analysis of the evidence by the intermediate court. We find the approach of the Court of Appeal, which merely endorsed the findings of the trial judge because they were findings of fact, slightly discomfiting. We wish to state that we are well aware of the settled principle that a trial court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses, hence generally as an appellate court we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so. Further, a distinction has to be made between a finding on a specific fact which relies on the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion, than in the case of the former (see *China Airlines Ltd v. Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517). Having said the foregoing we are also of the view that an appellate court cannot in a peremptory fashion say, because it is an assessment of facts of a trial judge against the oral and written evidence presented before him, they are not prepared to interfere with such a finding of fact, without even making any distinction as to the nature of the findings. It is only after an analysis of the evidence afresh, and on a review of the law can such a finding be made by an appellate court. Without this approach, the endorsement of the appellate court, deserves little or no weight at all.

[55] Steve Shim CJ (Sabah and Sarawak) in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, at pp. 10 to 11, had this to say about appellate intervention:

(14) In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/

or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

To The Heart Of The Matter

[56] Learned counsel on both sides argued at length on a number of issues and those issues will now be ventilated. Madam Yoong Sin Min projected a picture that the appellants have been very accommodative to the first respondent, who is nothing more than a "persistent defaulting customer". Mr Tan Keng Teck, on the other hand, submitted that the evidence adduced at the trial demonstrated that the appellants were the defaulting parties to the financial arrangement and it was on this basis that the High Court Judge gave judgment in favour of the respondents.

[57] Mr Tan Keng Teck narrated the history behind the project. He started off by stating that in the year 1995, the first respondent embarked on the project and that the initial financier was Bank Kerjasama Rakyat Malaysia Bhd. In 1996, the first appellant approached the first respondent to arrange a refinancing of its loans. For this purpose, the first appellant prepared an information memorandum which revealed that the project was viable and profitable as reflected at pp. 4237 to 4241 of the appeal record at jilid 42/44. It must be borne in mind that at that material time, the first respondent was not in default of the facilities granted by Bank Kerjasama Rakyat Malaysia Bhd. That the first appellant arranged a syndicated loan arrangement with the participation of the second, third and fourth appellants. The syndicated loan arranged by the first appellant was for the sum of RM62.5 million and disbursements were in the following manner:

(a) Tranche "A" for the sum of RM28.5 million was to redeem Bank Kerjasama Rakyat Malaysia Bhd's loan;

(b) Tranche "B" in the sum of RM15 million was for the construction of Phase 1 of the project; and finally

(c) Tranche "C" in the sum of RM15 million for the purpose of constructing Phase 2 of the project.

[58] Mr Tan Keng Teck submitted that Tranche "A" and Tranche "B" were fully disbursed. The sum total disbursed came up to RM43.5 million.

[59] The first respondent made payments in the sum of RM19.828 million. The outstanding loan amount as at October 1998 came up to RM27.672 million. Verification of these figures can be seen at p. 4256 of the appeal record at jilid 42/44.

[60] On its own volition, the first respondent cancelled Tranche "C". This was in 1997. Soon thereafter, the first respondent encountered problems with its main contractor because the latter was unable to continue with the project based on the agreed financing. As at 1997, Phase 1 of the project was approximately 87% completed.

[61] In 1998, the first respondent approached the appellants and requested for additional loans. Be it noted, that these loans were meant to complete Phase 1 and re-launch a new Phase 2. Instead of considering the first respondent's request, the appellants told the respondents to deal direct with Pengurusan Danaharta Nasional Bhd ("Danaharta"). The financial arrangement with Danaharta fell through because the first respondent did not agree with the proposals advanced by Danaharta.

[62] The first appellant could not force the first respondent to agree with Danaharta proposals because at that point of time, the first respondent was not in default of its financial commitments with the appellants. And the appellants were also reluctant to provide additional loans to the first respondent. The first respondent had no alternative but to seek the assistance of BNM via Dato' Murad, the Assistant Governor. Dato' Murad contacted the first appellant's CEO, Dato' Mohammed Hussein, and directed the appellants to grant additional loans to the first respondent.

[63] This directive by BNM to the appellants was in accordance to the prevailing policy of BNM to grant financial support to commercial developments that were nearing completion. According to Mr Tan Keng Teck, this fact was corroborated by DW1's testimony at p. 731 of the appeal record at jilid 9/44 to this effect:

> BNM had given some restrictions but not directive to stop further financing of incomplete project.

[64] The first appellant did not comply strictly with BNM's directive. Instead, the first appellant instructed the second respondent to deal personally and directly with the other three appellants to secure further financial facilities. Again, according to Mr Tan Keng Teck, this fact was corroborated by DW1's testimony at p. 734 of the appeal record at jilid 9/44 to this effect:

> Counsel
>
> Do you agree at that material time, some of Syndicate Lenders are not supporting the reinstatement of Tranche 'C' and additional facilities?
>
> DW1
>
> There are some dissenting Lenders.
>
> Counsel
>
> In that event do you recall advising Dato' Richard Lee to approach the Lender's individually?
>
> DW1
>
> Yes.

[65] Mr Tan Keng Teck submitted that it was through the efforts of the first respondent that the appellants finally relented and granted further financing to complete Phase 1 and, at the same time, to re-launch the new Phase 2 of the project. Finally, it was on 7 December 1999 that the supplemental facilities agreements were executed.

[66] I pause here and take stock of the situation. Having heard the submissions of learned counsel on both sides, this appeal centred on findings of fact by the High Court Judge. While the appellants argued that the High Court Judge made wrong findings

of fact due to insufficient appreciation of the evidence adduced at the trial, the respondents argued to the contrary and pointed out that the High Court Judge had rightly made the following findings of fact as reflected at pp. 121 to 122 of the appeal record at jilid 2/44:

> The plaintiff had placed trust and confidence in the defendant and Co-Lenders. They had assumed responsibility for providing the borrower with investment and financial advice. For reasons best known to themselves and for apparent ulterior motives the defendant and Co-Lenders did not hold up their end of the bargain. They had breached their duties owed to the plaintiff in contract, and tort and as a banker.
>
> It is my finding therefore that the defendant's and Co-Lenders had deliberately and maliciously engineered a default of the facilities by the plaintiff, by creating a purported default on the interest payments due under the Facilities and they had created the purported default on the interest payments and had deliberately withheld critical funds which were to be utilised by the plaintiff to complete the construction of the project together with a Certificate of Fitness for Occupation.
>
> It was solely due to the defendant's and Co-Lenders' deliberate and malicious mismanagement of the facilities that had caused the plaintiff's dire financial position.
>
> Furthermore the unlawful acts by the defendant and Co-Lenders is a breach of the plaintiff's legitimate contractual expectation that the facilities would be administered and managed by the defendant and Co-Lenders in a proper and *bona fide* manner and that the Facilities would be promptly drawndown to be used to complete Phase I and the revised Phase II of the Project.

[67] This appeal also centred on the pleadings of the parties. It is trite that the parties are bound by their pleadings. The court is not entitled to decide a suit on a matter that is not pleaded. It is a fundamental rule of natural justice that the opposite party must be informed of any adverse issue so that the other party has the opportunity to challenge it and not be caught by surprise. It is also salutary to mention that when the trial court decides on an issue that is not pleaded, the judgment can be set aside. The authorities on these points are legion and they are easily available in the law journals. Suffice for this exercise to cite a few of them: *Wong See Leng v. C Saraswathy Ammal* [1954] 1 LNS 133; [1954] 20 MLJ 141, at p. 142; *Koh Siak Poo v. Sayang Plantation Bhd* [2002] 1 CLJ 501; [2002] 1 MLJ 65; *Quah Swee Khoon v. Sime*

Darby Bhd [2001] 1 CLJ 9; [2000] 2 MLJ 600; *Lever Brothers, Limited, And Others v. Bell And Another* [1931] 1 KB 557; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, at p. 155; *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615; *S Manickam & Ors v. Ismail bin Mohamad & Ors* [1996] 1 LNS 117; [1997] 2 MLJ 90; *Narayanan v. Kannamah* [1993] 4 CLJ 389; [1993] 3 MLJ 730; *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22; *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors* [1989] 2 CLJ 557; [1989] 1 CLJ (Rep) 116; [1989] 2 MLJ 416, at p. 418; *Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan* [1992] 1 CLJ 180; [1992] 3 CLJ (Rep) 497; [1987] 1 MLJ 393; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302; *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633; *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157; *Ria Enterprise & Ors v. MBf Finance Bhd* [2001] 1 CLJ 687; *Rosita Baharom & Anor v. Sabedin Salleh* [1992] 1 CLJ 180; [1992] 3 CLJ (Rep) 497; [1993] 1 MLJ 393; *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10; *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; [1995] 1 MLJ 577; *Abdul Rahim bin Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417; and *Lim Tiong Huai v. Wang Swee Teck berniaga sebagai Wang Plumbering & Electric Co* [2003] 1 LNS 564; [2004] 1 MLJ 638.

[68] I will now consider the submissions of the parties under separate headings:

No Valid Cause Of Action

[69] For this exercise, it is appropriate to refer to the statement of claim of the first respondent against the first appellant as seen in Suit No: 665. At para. 52, the first respondent pleaded as follows (see pp. 22 to 24 of the Ikatan Pliding in green bundle):

> 52. The plaintiff contend that the defendant was under a duty to act in good faith and honestly in granting and to administer the drawdown of the Loan Facility to the plaintiff for the sole purpose of completing the construction of the Revised Project. At all material times, the defendant had breached its duty and legal obligations to the plaintiff:

PARTICULARS OF BREACH

(a) failure to allow drawdown and make available the Loan Facility even though the plaintiff had complied with (the) conditions precedent of the Supplemental Facility Agreement;

(b) failure to allow drawdown (of) the Facility even though the plaintiff had complied with the defendant's request to appoint a Consultant to prepare a Feasibility Report on the viability of the Revised Project, wherein the Consultant had recommended in the best interest of the parties the Revised Project ought to be completed;

(c) failure to promptly issue a redemption statement at RM38,500,000 even though the defendant was fully aware of the following:

(i) that the plaintiff had secured fresh financing for the Revised Project from a white knight; and

(ii) the plaintiff had secured a letter of waiver from the majority of its purchasers for the Revised Project to limit the total liquidated damages for late delivery of the individual properties in the Revised Project to RM10,000,000.00;

(d) failure to approve and disburse the Advance Payments for statutory compliance to the plaintiff, including but not limited to the Bank Guarantee to JPP, even though the defendant was fully aware that the statutory payments were required to obtain the requisite Certificate for Fitness for the Phase I;

(e) failure to assist the plaintiff to commence the operations of the Phase I even though the defendant was fully aware that the proceeds of rental of the Phase I was required by the plaintiff to repay the Loan Facility granted by the defendant, co-lenders and MAA; and

(f) failure to grant the plaintiff an extension of the Moratorium Period to the 30/1/2006, when the defendant was fully aware that the delay of the commencement of the operations of Phase I was directly caused by the defendant's own failure to disburse the Advance Payments promptly to the relevant authorities.

[70] This would be followed by para. 54, where the first respondent pleaded as follows (see p. 24 of the Ikatan Pliding in green bundle):

54. By reasons of the matter aforesaid, the defendant is liable to the plaintiff for loss and damage arising from the breach of duty and obligations owed by the defendant to the plaintiff to act in good faith in granting and allowing drawdown of the Loan Facility for the benefit of the defendant.

[71] The first appellant's statement of defence against the first respondent in Suit No: 665 can be seen at para. 29 at p. 47 of the Ikatan Pliding in green bundle and it was worded as follows:

29. Paragraphs 52 to 55 of the Statement of Claim are denied. The defendant states that:

(a) it owes no duty or obligation to the plaintiff as alleged and even if there were such duty or obligation (which is denied) there was no breach thereof;

(b) at all material times, the defendant, as agent for the Lenders and as Lender itself, had performed its duties properly and had attempted to assist the plaintiff as far as it could, without sacrificing the defendant's own interests as a prudent Lender;

(c) the plaintiff itself, is still owing the Lenders RM39,512,694.88 as at 30.6.2005. Its inability to repay its facilities or complete its Project rests solely on its shoulders and the defendant cannot be made liable for the plaintiff's inadequacies;

(d) the plaintiff's claim for damages is unfounded, bare of particulars and wholly unsustainable. The entire claim herein is in fact frivolous, vexatious and a clear abuse of the Court process.

[72] It is obvious that the first respondent's only cause of action that was pleaded against the first appellant centred on the "breach of duty of good faith". The first appellant averred in its defence that no duty or obligation was owed to the first respondent as alleged and that the first respondent was still indebted to the appellants in the sum of RM39,512,694.88 as at 30 June 2005.

[73] It is the submission of the appellants that there is no general duty of good faith on the part of the appellants. It is also the stand of the appellants that the "breach of duty of good faith" is not a cause of action. "*Chitty on Contracts*", 29th edn., London Sweet & Maxwell 2004, at vol. 1 at p. 1-020 carried this caption:

> Nevertheless, the modern view is that, in keeping with the principles of freedom of contract and the binding force of contracts, in English contract there is no principle of good faith of general application ...

[74] Continuing at p. 1-024, the authors of "*Chitty on Contracts*" aptly said:

> Given the remarkably open-textured nature of good faith, this would lead to a very considerable degree of legal uncertainty, and could be seen as trespassing too far into the legislative domain.

[75] Lord Ackner writing for the House of Lords in *Walford and Others v. Miles and Another* [1992] 2 AC 128, at p. 138 laid down the law in these erudite terms:

> However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question – how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an agreement? 'A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies.

[76] Andrew Phang Boon Leong JA writing for the Court of Appeal of Singapore in *Ng Giap Hon v. Westcomb Securities Pte Ltd and Others* [2009] 3 SLR 518 extensively discussed the issue of good faith in various countries and came to the conclusion that there is no general duty of good faith in common law. At p. 544 of the judgment, His Lordship had this to say:

> 47. The doctrine of good faith is very much a fledgling doctrine in English and (most certainly) Singapore contract law. Indeed, a cursory survey of the relevant law in other Commonwealth jurisdictions appears to suggest a similar situation.

[77] Continuing at p. 546 of the judgment, His Lordship remarked:

> 51. Indeed, the copiousness as well as the variety of (and, perhaps more importantly, the debates in) the academic literature (coupled with the relative dearth of case law) suggest that the doctrine of good faith is far from settled. The case law itself appears to be in a state of flux ...

[78] Proceeding ahead at p. 548 of the judgment, His Lordship remarked:

> 54. Prof Furmston confirms the observation which we have just made in the preceding paragraph, ie, that the doctrine of good faith, although not lacking in supporters, particularly from theoretical as well as aspirational perspectives (see, for example, Roger Brownsword, *'Good Faith in Contracts' Revisited'* (1996) 4 CLP 111 and, by the same author, *'Two Concepts of Good Faith'* (1994) 7 JCL 197), is nevertheless still far from being an established doctrine under English law ...

[79] Finally, at p. 550 of the judgment, His Lordship rounded it up by saying:

> 60. In the circumstances, it is not surprising that the doctrine of good faith continues (as mentioned at (47) above) to be a fledgling one in the Commonwealth. Much clarification is required, even on a theoretical level. Needless to say, until the theoretical foundations as well as the structure of this doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere (see also *Service Station Association* ((51) *supra*), especially at 406-407 (per Gummow J); cf. Peden's 2001 article ((51) *supra*) at pp. 228-230). In the context of the present appeal, this is, in our view, the strongest reason as to why we cannot accede to the appellant's argument that this court should endorse an implied duty of good faith in the Singapore context.

Causes Of Action Not Pleaded

[80] Confronted with the reality of the matter, the respondents abandoned all arguments pertaining to a cause of action based on good faith. However, the respondents changed their course and relied heavily on "breach of legitimate contractual expectations". But, unfortunately, this was not pleaded and there is no such cause of action of this nature.

[81] In an otherwise well written judgment, the High Court Judge held that the first appellant was liable for "breach of duty of good faith" and for "breach of fiduciary duties". With due respect, the findings of the High Court Judge were all based on causes of action that were not pleaded. On this ground alone, the appeal should be allowed. Sharma J in *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196, religiously spoke about pleadings in this way:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

[82] Learned counsel for the respondents in the course of his submission in open court on 21 January 2013 conceded that the cause of action for breach of fiduciary duty was neither pleaded nor raised in his submission and he is not relying on it. But, learned counsel for the respondents take the position that the judgment of the High Court Judge should stand despite departing from the judge's findings of liability based on the breach of fiduciary duty. With due respect, the stand of learned counsel for the respondents cannot be right. A close scrutiny of the grounds of judgment of the High Court Judge will clearly show that the judge's findings on liability was hinged on its finding that the appellants were in a fiduciary relationship with the first respondent and therefore according to the judge, had "a heightened standard of care". At p. 81 of the appeal record at jilid 2/44, the High Court Judge had this to say:

> The core issue to be determined by this Court is whether the defendant and Co-Lenders were in breach of its contractual, tortious and professional duties to the plaintiff. An imperative corollary is whether the defendant and Co-Lenders owe any duty to the plaintiff and if so, whether they had breached that duty. Thus it is important to determine at the outset of the transaction

A how the relationship between the lead bank, participating banks and borrower is classified. This will have impact on the structure of the participation agreement as well as the liabilities of parties.

[83] Continuing at p. 88 of the appeal record at jilid 2/44, the High Court Judge said:

B

Thus on the facts, I am satisfied that the defendants were in a fiduciary relationship with the plaintiff and had not only not shown a heightened standard of care, it had in fact manifested bad faith and unfairness in the exercise of their duties as lenders towards the plaintiff. (emphasis added).

C

[84] With the concession of learned counsel for the respondents that the breach of fiduciary duties were not pleaded or even raised in submissions, the High Court Judge's findings on liability cannot stand. With respect, the whole judgment cannot stand and the

D appeal must be allowed.

[85] In *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430, the Federal Court was asked to decide on the first question for determination and that question was

E worded in this way:

Question 1

Whether it is open to an appellate court to find or hold that a contract has been frustrated notwithstanding that such had not

F been pleaded in the trial court or as a ground of appeal in the appellate Court?

[86] Zaki Tun Azmi CJ writing for the Federal Court answered the question posed in the negative. This was what His Lordship

G said at p. 439 of the report:

(19) It is trite that in pleading frustration, particulars which give rise to frustration must be provided specifically in the pleadings. The parties in this case had not pleaded or submitted that the contract in question had been frustrated. Thus, the defendants

H were highly prejudiced when the Court of Appeal decided on the issue of frustration.

(20) Therefore, the answer to the first question must be in the negative.

I **[87]** The importance of pleadings was also emphasised by Gunn Chit Tuan SCJ in *Yew Wan Leong v. Lai Kok Chye* (*supra*) which ultimately saw the setting aside of the trial court's decision

because it was based on an issue which was not raised by the parties in their pleadings. At p. 155 of the report, this was what His Lordship said:

> We would point out that this court has recently once again stressed the importance of pleadings in *Muniandy & Anor v. Muhammad Abdul Kader Muhd Saheed & 5 Ors* [1989] 2 MLJ 416 in which Mohamed Azmi SCJ stated at p 418 that:
>
> > Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p 233:
> >
> > > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...
> >
> > As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed and the order of the learned judge in dismissing the plaintiff's claim set aside.

[88] The Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188 emphasised the time-honoured principle of law that the parties are bound by their pleadings. James Foong FCJ delivering the judgment of the Federal Court had this to say at p. 202 of the report:

> (33) Second, the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings. This is trite as can be seen from the decision of this court in *Menah Sulong v. Lim Soo & Anor* [1983] 1 CLJ 26 where Ong Hock Thye CJ said:

> I think it is necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co Ltd & Anor v. Southport Corporation* [1956] 2 WLR 81 at p 91:
>
> > If an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they play in our trial system.
>
> (34) In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:
>
> > It is trite law that a party is bound by its pleadings.
>
> (35) On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[89] The decision of the Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* (*supra*) strikes a chord with the present appeal at hand. Here, the High Court Judge had made a finding that there was a breach of fiduciary duties owed by the first appellant to the respondents despite the failure on the part of the respondents to plead the same, and that would be fatal. With respect, such findings cannot stand and must therefore be set aside.

No Fiduciary Relationship

[90] Despite the concession of learned counsel for the respondents that he was not relying on the cause of action for breach of fiduciary duty which was not pleaded nor raised in his submission, it is also appropriate to state that no evidence was adduced on this.

[91] With respect, the High Court Judge on her own accord found that there was a fiduciary relationship between the appellants and the first respondent based on the following facts:

(a) that the first appellant (who was only the agent of the syndicated lenders comprising the second, third and fourth appellants) had asked the first respondent to liaise directly with the second to the fourth appellants to reinstate a portion of the facility and procure additional financing;

(b) that the appellants had asked for feasibility reports on the project; and

(c) that the appellants had asked for information from the first respondent in response to the first respondent's request for a reduced redemption sum.

[92] With respect, the High Court Judge had failed to consider that the relationship between the appellants and the first respondent was not fiduciary in nature. Simply put, the characteristics of their relationship was not fiduciary. It was a banker-customer relationship between the appellants and the first respondent while the second respondent stood as a guarantor in his capacity as the main director and shareholder of the first respondent. None of the facts alluded to by the High Court Judge created a fiduciary relationship. These facts were matters which were quite common and they usually arose in negotiations between the borrower and the lender and when the borrower was already in default.

[93] It must be emphasised that the first appellant is the agent to the second, third and fourth appellants. The first appellant is not an agent of the first respondent borrower. And that the loan agreements contained specific terms that nullified the existence of any fiduciary relationship.

[94] James Foong FCJ writing for the Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* (*supra*) recognised that a banker-customer relationship is purely contractual. His Lordship held that the Court of Appeal's finding that the banker-customer relationship was superimposed with a specific relationship because of the appointment of monitoring accountant was too far-fetched. His Lordship further held that the fiduciary relationship was not even pleaded and that the court must not create a cause of action lest it be accused of being biased towards one against the other. His Lordship also held that such activism must be discouraged.

[95] I venture to say that judges are not empowered to add new terms to the contracts where the parties have not expressed them. It is advisable that judges should refrain from embarking on a reconstruction of contracts where the parties have agreed to sign them. Judges have no right to make contracts for the parties. Their duty is simply to interpret contracts and not add new terms to it.

[96] Lord Steyn in *Equitable Life Assurance Society v. Hyman* [2000] 3 All ER 961, HL, at p. 970 spoke of the need to give the appropriate meaning to the words employed in the contract.

[97] Chadwick LJ in *Megaro v. Di Popolo Hotels Ltd* [2007] EWCA Civ 309, aptly said that:

> The court does not, through the guise of interpretation, make for the parties a bargain which they did not themselves choose to make. It is not for the court, through the guise of interpretation to substitute for the bargain which the parties did make a different bargain which in its view they would have made if they had been better advised or had had better regard for their own interests.

[98] What Lord Hoffmann said in *Investors Compensation Scheme Ltd v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) And Others* [1998] 1 WLR 896, HL, at p. 913, bears repetition:

> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

[99] And what Longmore LJ said in *Royal and Sun Alliance Insurance plc v. Dornoch Ltd and Others* [2005] 1 All ER (Comm) 590, CA, at p. 597, should be heeded:

> ... there are dangers in judges deciding what the parties must have meant when they have not said what they meant for themselves. This is particularly dangerous when the parties have selected from the shelf or the precedent book a clause which turns out to be unsuitable for its purpose. The danger is then intensified if it is only one part of such a clause which is to be construed in accordance with 'business common sense'. If the parties had addressed their mind to the question which clause out of a number of standard terms they would have used for the particular requirement which they had in mind, it is by no means obvious that they would have selected a form which was as draconian as the one unwisely but in fact chosen.

[100] In regard to the relationship between a banker and his customer, I had this to say in *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* (*supra*) at p. 40:

> (97) Now, what is the relationship between a banker and his customer? According to the House of Lords in *Edward Thomas Foley v. Thomas Hill and Others* [1848] 2 HL Cas 28, the banker and customer relationship was essentially of debtor and creditor. In holding that the relationship of the banker and customer was one of debtor and creditor and not that of trusteeship, Lord Brougham had this to say at p 44 of the report:
>
> > This trade of a banker is to receive money, and to use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to the customer, I cannot, without breaking down the bounds between equity and law, - without, as it were, removing the land-marks of jurisprudence, - I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character.

[101] The nature of the banker-customer relationship is entirely contractual. There is nothing fiduciary about it. The sole intention of the bank is to make a profit. There is no special relationship between the bank and the customer. In each of the loan agreement, there is a specific clause that states that there is no fiduciary relationship with the borrower. A classic example would be cl. 33.2.1 of the 1999 agreement which stipulates as follows (see pp. 55 to 56 of ACB (1)):

> 33.2 Relationship
>
> 33.2.1 In connection with its powers, discretion, authorities and duties under this Additional Facility Agreement and the Security Documents, the Agent shall act solely as the agent of each of the Lenders and the Agent is not assumed to be in the position or shall be deemed to have assumed, any obligation to or fiduciary relation with, the Lenders other than those for which specific provision is made by this Additional Facility Agreement or the Security Documents or any obligations to, or fiduciary relationship with, the Borrower.

[102] Clause 31.2 (i) of the 2003 agreement at p. 455B of ACB (1) is another example and it is worded as follows:

> 31.2 Relationship
>
> (i) In connection with its powers, discretion, authorities and duties under this Supplemental Facility Agreement and the Security Documents, the Agent shall act solely as the agent of each of the Lenders and the Agent is not assumed to be in the position or shall be deemed to have assumed, any obligation to or fiduciary relation with, the Lenders other than those for which specific provision is made by this Supplemental Facility Agreement or the Security Documents or any obligations to, or fiduciary relationship with, the Borrower.

[103] Millett LJ in *Bristol and West Building Society v. Mothew* [1998] Ch 1, CA, at p. 18 in refined language explained the meaning of the word "fiduciary" in this way:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* [1977], p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[104] Continuing on the same page, His Lordship said:

> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[105] But the respondents did not plead the cause of action for breach of fiduciary duty. Clause 33.2.1 of the 1999 agreement and cl. 31.2 (i) of the 2003 agreement would hinder the respondents from pleading it. And in *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* (*supra*), at pp. 43 to 44 of the report, I had this say:

> (115) Perhaps the relationship between a bank and its customer is best summed up by Lord Woolf CJ in the case of *Governor and Company of the Bank of Scotland v. A Ltd and Others* [2001] 1 WLR 751, at pp. 760-761:
>
> > These submissions call for some explanation since on the face of it the relationship between a bank and its customer is not a fiduciary relationship. It is a commercial relationship founded in contract into which the intrusion of equitable doctrines such as constructive notice may result, in the well-known words of Lindley LJ in *Manchester Trust v. Furness* [1895] 2 QB 539, 545, in 'doing infinite mischief and paralysing the trade of the country' ... Nevertheless, it is clear that a bank may become subject in equity to an accessory liability if it dishonestly assists in a breach of trust committed either by its customer or by others. When a bank account is in credit the bank's relationship to the customer is that of debtor, not trustee (*Foley v. Hill* [1848] 2 HL Cas 28). But if the debt owed to the customer is affected by any equitable interest or claim of a third party the bank may become accountable in equity if it dishonestly assists in any course of action which disregards the third party's interest or claim.

[106] This appeal centred on the relationship between the appellants as the "banker" and the respondents as the "customer". Their relationship was purely contractual. The appellants were the lenders and creditors while the respondents were the borrowers and debtors. Their relationship remained static and circumscribed contractually and there was no fiduciary relationship between them at all.

[107] Learned counsel for the appellants pointed out that the High Court Judge failed to consider that the first appellant owes a fiduciary duty to the other appellants, as the agent of the lenders, and not to the borrower. In this connection, it is ideal to refer to the "*Encyclopaedia of Banking Law*", Binder IA, at para. 3407, which states as follows:

AGENT IS AGENT OF BANKS NOT BORROWER

> The agent bank is invariably the agent of the banks and not of the borrower. Except as the contract otherwise provides, an agent generally owes no duties to anyone other than his principal. Hence an agent bank could not be sued by the borrower for default by a member of the syndicate in making the loans; ...

[108] Even cls. 33.1, 33.2 and 33.3 of the 1999 agreement expressly provide that the first appellant as the agent is to act solely as an agent to the lenders (the second to the fourth appellants) and not to the borrower (first respondent).

[109] Still on the issue of fiduciary relationship, reference should be made to the case of *Murphy and Another v. HSBC plc (formerly known as the Midland Bank plc) and Another* [2004] EWHC 467 (Ch). There Silber J had this to say about the fiduciary duty issue:

> 101. The claimants contend that the Bank owed them fiduciary duties. I am unable to accept that contention. It is settled law that 'on the fact of it a relationship between a banker and a customer is not a fiduciary relationship' (per Lord Woolf CJ in *Bank of Scotland v. A Ltd* [2001] 3 All ER 58, 65 (25)). The basic banking transaction of lending is not fiduciary in nature and so in the ordinary course of events, a bank which lends to a customer does not owe the customer a fiduciary duty. The mere fact that the claimants trusted the Bank does not give rise to a fiduciary duty when, as in the present case, first the claimants had their own paid advisors, second the claimants had freely chosen to enter into contracts of loan and insurance with the Bank when they could have gone elsewhere to obtain those services and third, the Bank were not the paid or the unpaid advisors of the claimants but merely a lender of money to them.

[110] The respondents bear the burden of proving the existence of a fiduciary relationship between the lender and the borrower. On this point, the learned authors of the book entitled, "*Banks, Liability and Risk*" edited by William Blair QC, 3rd edn., had this to say at p. 40:

> (ii) where there exists a fiduciary relationship between the lender and borrower.
>
> 2.60 It is unlikely that the courts would normally find a fiduciary relationship between lender and borrower (see for example, *Guardian Ocean Cargoes Ltd v. Banco do Brasil S.A. (Nos 1 & 3)* [1994] 2 Lloyd's Rep 152 and also the Privy Council's observations in the non-banking case of *Kelly v.*

> *Cooper* [1993] AC 205). A loan agreement is neither a relationship of confidence nor one premised on confidence. It is one transacted at normal arm's length (*LAC Minerals Ltd v. International Corona Resources Ltd* [1989] 61 DLR (4th) 14; Austin, [1986] OJLS 444). The burden of proving that there does exist a fiduciary relationship on the borrower is thus exceedingly onerous.

[111] In an unreported judgment of Judicial Commissioner Lee Swee Seng in Civil Suit No: S6-22-705-2005 between *Nusantara Network Sdn Bhd and Malaysia Building Society Bhd* [2010] 1 LNS 1521, his Lordship was concerned with a suit that was filed by the borrower against the bank for failing to disburse monies. The borrower had defaulted due to the 1997/1998 economic crisis, similar to the present appeal at hand. His Lordship narrated the events leading to the filing of the said civil suit in this way:

> The story about to unfold took place in the context of the East Asian financial crisis and the sale of the outstanding loan to Danaharta. The borrower being unhappy, sued the lender for damages for breach of contract alleging that the lender had breached the contract in its failure to disburse the balance of the loan sum triggering a series of events that resulted in its land being sold to a third party and the eventual failure of the project.

[112] And in dismissing the borrower's claim, His Lordship had this to say:

> Borrowers like the plaintiff would be quick to find fault with the Lender if the defendant as a Lender had not granted any indulgences at all or was not prepared to negotiations or to the proposal of the plaintiff for restructuring of the Loan. Be that as it may, until the Lender agrees to the new terms being proposed by the Borrower, the terms and conditions of the FA would be operative. Otherwise Lenders would be held to ransom by the Borrowers in that on the one hand the Lenders cannot agree to the terms proposed by the Borrowers affected and yet on the other hand the Lenders cannot enforce the terms and conditions agreed upon before the disbursement of the Loan. This would put Lenders in a precarious position and none would want to negotiate with the Borrower at all. That would be a sad day for business.

[113] Justice Balia Yusof Wahi J (now JCA) in an unreported judgment in Civil Suit No: S-22-05-1996 between *Sri Alam Sdn Bhd and United Malayan Banking Corporation Berhad* [2011] 1 LNS 384 was concerned with the developer of a project who had sued the bank, and alleged that the bank refused to give a redemption statement. The developer claimed that

the bank's failure had caused it to lose three re-financiers. The bank's defence was that it could not agree to the terms for redemption where the developer wanted to sell the assigned units because the developer had defaulted and the bank was not given the information as to which parties the assigned units would be sold to. And the redemption offered by the developer was too low. In dismissing the developer's claim with costs of RM35,000 Justice Balia Yusof Wahi had this to say:

> On the facts and the circumstances of the case, the court finds that there is no fiduciary relationship between the plaintiff and the defendant and I am in full agreement with the submissions of the learned counsel for the defendant that the relationship between the plaintiff and the defendant is that of a banker and a customer relationship. There is no doubt about the assignment but the court finds no condition imposing or creating that fiduciary relationship under the assignment agreement.

[114] Here, the High Court Judge found that the first respondent was in a "vulnerable position" when the parties were negotiating for the reduced redemption sum for the discharge of the project land. At pp. 86 to 87 of the appeal record at jilid 2/44, the High Court Judge had this to say:

> It is my view that the plaintiff in this case was placed in a vulnerable position on a number of occasions, not least with regards to the question of making good the loan amount. Firstly the plaintiff, after it had secured a white knight to assist in its loan repayment, sought the redemption sum from the defendant.
>
> To begin with, as had been alluded to earlier I find that the defendant has caused an enormous amount of delay in issuing the requisite redemption statement. Questions were still asked of the plaintiff by the defendant, queries were still made, even after answers were posted. Due to the provisions in the Agreements and variables found in the loan itself, it was imperative that delays be minimised. Factors such as the possibility of the white knight changing its mind to rescue the plaintiff and the spectre of the LAD made time a very critical factor. All these delays by the defendant were unnecessary, all the more when the defendant **had knowledge** of the procurement of the letters of waiver and **was aware** that the plaintiff's exposure to LAD for late delivery of the individual properties would substantially be reduced provided the Revised Project was completed on or before 31.12.2002. (emphasis added).

> Thus, when the final outcome was that the much reduced amount to be given by the white knight fell down further to RM35 million (from the initial amount of RM38.5 million) and even this was to be further reduced by a cut of RM8.5 million which was asked for by the defendant as upfront payment, the plaintiff's vulnerability was never more stark. The plaintiff had to accept that reduced amount, since any protestation on its part would result in further delays.

[115] With respect, the assertions of the High Court Judge cannot be right. It must be borne in mind that the first respondent had already defaulted under the facilities and the respondents were trying their level best to negotiate and secure a reduced redemption sum. That being the case, it cannot be said that the first respondent "was placed in a vulnerable position" because any defaulting borrower seeking indulgence from its lender would undergo the same experience. Moreover, vulnerability by itself cannot be sufficient to impose a fiduciary relationship between the parties. Otherwise, a fiduciary relationship would be imposed on all lenders and defaulting borrowers negotiating a settlement.

[116] The parties were dealing with each other at arm's length and that relationship should not be labelled as fiduciary and cannot give rise to a fiduciary relationship. It was simply a banker-customer relationship and nothing else.

Reliance On American Codified Law To Create A New Cause Of Action For "Breach Of A Duty Of Good Faith"

[117] The High Court Judge relied heavily on the American law codified in the Uniform Commercial Code ("UCC") and other American authorities to drive home the point that tortious liability for "breach of a duty of good faith" could be invoked against the lender bank. At pp. 118 to 121 of the appeal record at jilid 2/44, the High Court Judge had this to say:

> Duty to Act in Good Faith and Honesty
>
> The defendant contend that a breach (if at all) of the duty to act in good faith and honesty is not a proper or even a cause of action. This contention of the defendant's was put in not without some derision on its part. The defendant contended that no such cause of action even exist, to begin with.

A The question now is: Is this true?

The Contractual Duty of Good Faith and Fair Dealing

What is 'good faith'? In effect it refers to two fundamentally different senses: (a) 'good faith purchase' and (b) 'good faith
B performance'. In the former, a person is a purchaser in good faith only if the person acted with innocent ignorance or a lack of suspicion. The latter meaning of 'good faith' refers to an inquiry as to decency, fairness or reasonableness in performance or enforcement.

C This concept is especially found in the American common law, codified in its Uniform Commercial Code (UCC).

Both common sense and tradition dictate that good faith performance, such are those in loan agreements as in the instant case, would be measured by an objective standard, 'based on the
D decency, fairness or reasonableness of the community'. (See Farnsworth *'Good Faith Performance and Commercial Reasonableness ...'* [1962] 30 University of Chicago LR 666).

In fact, I find the New York Court of Appeals case of *Kirke La Shelle Company v. Paul Armstrong Company* 263 NY 79 [1933] at
E p. 87, to be persuasive. It states that:

> ... In every contract there is an implied covenant that neither party shall do anything which will have (the) effect of destroying or injuring the right of the other party to receive
F the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

In fact in the United State, the contractor's duty of good faith and fair dealing has proved to be a source for invoking lender
G liability litigation. Although I am aware that the said contracts in the United States are governed by the UCC, a proper construction of our contract laws would also imply the imposition of the common law duty of good faith and fair dealing. The case of *KMC Company v. Irving Trust Company* 757F 2d 752 (6th Cir.
H 1985) in the United States was ruled in the borrower's favour, against a lender who precipitately refused to advance further funds within the limits of a loan facility.

Although a fusillade of criticisms has been launched against the obligations of good faith and fair dealing even in the United States,
I courts have stood steadfast in granting the borrower this cause of action.

In fact it even went a step further in allowing claims for tortious liability for breach of the contractual obligations of good faith and fair dealing, though some of the decisions have been criticised.

However there is general agreement that traditional tort remedies can be invoked in lender liability suits. Actions founded upon fraud, duress, tortious inference with contracts and negligence have been successful against lenders. (See *Gran off 'Emerging Theories of Lender Liability: Flawed Application of Old Concepts'* [1987] 104 BLJ 492 at pp. 501-505 and 512. Anon, *'Lender Liability: Breach of Good Faith Lending and Related Theories* [1988] 64 North Dakota LR 273 at pp. 303-314).'

A case in point is *State National Bank of El Paso v. Farah Manufacturing Co* L678 SW 2d 661 Tex Civ App 1984, which provides an illustration of duress in the form of economic coercion. The borrower was not in default on its loans, nor was its ability to service the loans in the future questioned. Yet the bank compelled the borrower to comply with its demands through the 'threat of default and imminent bankruptcy and padlocking'. The Court held that it was a clear abuse of power by the Lenders over a financially dependent borrower and it amounted to actionable duress.

Thus tortious liability for breach of a duty of good faith and fair dealing has been utilised in the field of Lender liability. It follows therefore that parties to a contract are subject to an implied duty to do all that is reasonably necessary to secure performance of the contract. 'Neither party may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit'. (Per Dixon J in *Sheppard v. Fett and Textiles of Australia Ltd* [1931] 45 CLR 359). Even if it is argued that it is not necessary to imply a term relating to good faith performance into a loan contract in order to give it business efficacy, our case laws indicate that courts are prepared to imply a term relating to good faith performance if the Lender assumes special or fiduciary responsibilities, as in the instant case.

[118] It is prudent to approach American law and authorities with caution. On the facts, the American authorities relied upon by the High Court Judge especially *KMC Co Inc v. Irving Trust Company* 757 F 2d 752 (6th Cir. 1985); and *State National Bank of El Paso v. Farah Manufacturing Company Inc* 678 SW 2d 661 Tex Civ App 1984 are not applicable to the present appeal at hand.

[119] Madam Yoong Sin Min submitted that the respondents did not raise any of the American authorities nor the UCC, yet the High Court Judge made reference to them in her judgment.

[120] It is appropriate, at this juncture, to refer to s. 5(1) of the Civil Law Act 1956. That s. 5(1) enacts as follows:

> 5. Application of English law in commercial matters
>
> (1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

[121] What it amounts to is this. That it is English law that will apply to questions or issues with respect to banks and banking. It is crystal clear that the High Court Judge had applied the wrong legal principles in relying on American law and statute to impose good faith in banking contracts when this approach is contrary to the position in English law. And, according to Madam Yoong Sin Min, on this point alone, the appellants should succeed in overturning the decision of the High Court Judge because the first respondent had failed to establish any cause of action.

[122] Madam Yoong Sin Min further submitted along the following lines. That the judgment of the High Court Judge should be set aside because if it is allowed to stand, a duty of good faith is now implied in all lending contracts and a new tortious cause of action for breach of such duty would be created. That the Court of Appeal in Singapore in the case of *Ng Giap Hun v. Westcomb Securities Pte Ltd and Others* (*supra*) was similarly asked to imply a duty of good faith in Singapore and Andrew Phang Boon Leong JA, delivering the judgment of the Court of Appeal in Singapore, discussed at length the practical problems and uncertainties of imposing such a duty before holding that the court would not impose such a duty of good faith in Singapore.

[123] Madam Yoong Sin Min pointed out that if the findings of the High Court Judge are affirmed, there will be uncertainty in lending contracts between the bank and the borrower in such matters pertaining to:

(a) the extent of such duty of good faith;

(b) what amounts to a breach of such a duty; and

(c) how to enforce contractual terms in view of such a duty.

[124] In the United States of America, in the case of *Standard Wire & Cable Company v. Ameritrust Corporation* 697 F Supp 368 [1988] US District LEXIS 11251, a tortious breach of good faith has not been allowed unless it can be shown that there is a special relationship. At p. 5 of the report, the court had this to say:

> Only the 'special relationship' theory is applicable here. For a special relationship to exist between the parties, the plaintiff must prove each and all of 5 elements:
>
> (1) the contract is such that the parties are in inherently unequal bargaining positions;
>
> (2) non-profit motivation for the contract;
>
> (3) contract damages will not adequately compensate the plaintiff for the breach;
>
> (4) plaintiff's vulnerability because of the defendant's position of trust; and
>
> (5) defendant's knowledge of plaintiff's vulnerability.

[125] And the court then proceeded to hold that a borrower/lender is not in a special relationship because as parties, they are not inherently in an unequal bargaining position and are not non-profit motivated.

[126] Lord Scarman speaking for the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others* [1985] 2 All ER 947, PC, held that in a banker and customer relationship, the parties' mutual obligations in tort cannot be any greater than those to be found expressly or by necessary implication in their contract. And flowing from this legal proposition, Madam Yoong Sin Min submitted that even if there was a duty of good faith, the appellants had not breached such a duty because the

appellants had acted within their contractual rights at all times. I agree and may I add that a "breach of duty of good faith" is not a cause of action and there is no general duty of good faith in common law.

Insufficient Judicial Appreciation Of The Evidence

[127] Under this heading, a wide range of sub-topics will be considered. I will now undertake to do so.

Refusal To Allow Further Drawdown Under The 1999 First Restructuring

[128] The first complaint launched by the first respondent against the appellants was the argument that the appellants had wrongfully refused its request on 3 July 2000 for the drawdown of the facilities under the 1999 first restructuring. Now, prior to the 1999 first restructuring, the appellants had already fully disbursed RM47.5 million under the facilities. And although the appellants were under no obligation to assist the first respondent, the appellants were magnanimous and agreed to the 1999 first restructuring of the facilities with some of the terms as set out at p. 34 of ACB (1), namely:

(a) that the outstanding interests were capitalised as principal;

(b) that Tranche "C" comprising RM15 million was reinstated and an additional RM17 million was granted;

(c) that more time was accorded to the first respondent to repay the facilities; and

(d) that payment of redemption sums agreed to be made to the second, third and fourth appellants for contra units was waived.

[129] Soon thereafter, the appellants disbursed a further sum of RM7,734,420.64 under the 1999 first restructuring. But, the appellants were compelled to refuse the first respondent's request of 3 July 2000 for a further drawdown of RM359,096.33 as the first respondent had failed to comply with the conditions precedent for drawdown, which included:

(a) the failure to service the monthly interest; and

(b) the failure to maintain sufficient funds for six months worth of interest in the DSRA at all times.

[130] It is apparent that the first respondent was in arrears of interest and that the conditions precedent for drawdown had not been met. The first appellant's letter dated 26 May 2000 to the first respondent as seen at pp. 58 to 59 of ACB (1) showed that the interest was overdue. The first appellant's letter dated 26 May 2000 to the first respondent was worded in this way (the relevant portions only):

> Kindly be advised that the drawdown of RM1,748,245.14 shall be subject to the following:
>
> (i) payment of RM72,906.38 be made into the DSRA; and
>
> (ii) an amount which is equivalent to at least two months interest is to be maintained in the DSRA.
>
> However, future drawdown shall only be allowed subject to compliance of the following conditions:
>
> (i) regularisation of overdue interest;
>
> (ii) deposit the required amount in the DSRA; and ...

[131] Again, by way of a facsimile transmission dated 17 October 2000, the first appellant reminded the first respondent about the arrears of interest in these words (see p. 61 of the ACB (1)):

> On another note, we wish to express concern that interest-servicing of the Facility is in arrears, ie, outstanding for more than five (5) months. As such, we seek your urgent co-operation to put in more efforts to avoid further deterioration of the above Facility, i.e. to regularise the overdue interests and to deposit sufficient funds in the Debt Service Reserve Account to service more than one month's interests before October 21, 2000. As much as we understand that the Company is facing a tight cashflow position, putting in the above efforts would reflect the Company's commitment towards its debt obligations.

[132] Yet, the first respondent had the audacity to say that it was not in arrears of interest payments and argued, after the fact, that:

(a) the redemption payments made to the appellants should have been utilised towards settling the interest first instead of the principal; and

(b) there was a RM2 million fixed deposit pledged by the second respondent to the fourth appellant which ought to have been uplifted to settle any arrears in interest.

[133] By the first respondent's failure to service the interest and the 2003 second restructuring that came into existence, the appellants rightly argued that the first respondent should be estopped from raising such stale events to bolster its stand.

Redemption Payments Do Not Go Toward Interest But To Principal

[134] The High Court Judge held that the first respondent was not in arrears of interest and that the appellants were wrong in not allowing further drawdowns. And the High Court Judge relied on cl. 12.6 of the 1999 agreement to arrive at this conclusion. That clause reads as follows (see p. 47 of the ACB (1)):

> 12.6 Repayment Of Interest First
>
> No part of any payment by the Borrower (referring to the first respondent) to the Agent (referring to the first appellant) and the Lenders (referring to the second to the fourth appellants) shall be treated as a repayment of principal until all Interest, Default Interest calculated as herein provided and due or deemed to be due and accrued shall have been paid.

[135] But, with respect, the High Court Judge failed to consider cls. 9.1 and 9.4 of the 1999 agreement which imposed an obligation on the first respondent to pay the interest. Clause 9.1 of the 1999 agreement reads as follows (see p. 43 of the ACB (1)):

> 9. INTEREST
>
> 9.1 The Borrower (referring to the first respondent) shall continue to pay interest in accordance with the provisions of this Supplemental Facility Agreement whether before or after judgment and notwithstanding that the banker-customer relationship between the Agent (referring to the first appellant) and the Lenders (referring to the second to the fourth appellants) and the Borrower (referring to the first respondent) is terminated for any reason whatsoever as stipulated under this Supplemental Facility Agreement under Clause 9.2 hereinbelow.

[136] While cl. 9.4 of the 1999 agreement reads as follows (see p. 44 of the ACB (1)):

> 9.4 Payment of Interests
>
> 9.4.1 Interests on the Sums Advanced calculated as aforesaid on the basis of actual days elapsed and a three hundred and sixty five (365) day year inclusive of the first day of the period in respect of which it shall be charged on the last day of such period shall be paid by the Borrower (referring to the first respondent) to the Agent (referring to the first appellant) and the Lenders (referring to the second to the fourth appellants) on the last day of each Interest Period.
>
> 9.4.2 In the event that there are more than one (1) drawing and that the last day of the Interest Period do not coincide, then such dates shall run co-terminously at the date or dates to be decided by the Agent (referring to the first appellant).

[137] Be that as it may, it must be stressed that the payments referred to by the respondents were not made by the borrower (the first respondent), but they were, in fact, redemption payments made by the end-purchasers to redeem their respective units from the first appellant. These cannot be construed as payments from the borrower (the first respondent) directly.

[138] The High Court Judge also failed to consider that the redemption payments were meant to settle the principal first. And this is provided for in cls. 12.1 and 12.2 of the 1999 agreement. Clause 12.1 of the 1999 agreement reads as follows (see p. 45 of ACB (1)):

> 12. REPAYMENT/PRE-PAYMENT
>
> 12.1 The Restructured Facilities and the Reinstated Facilities shall be repaid by thirty five (35) equal monthly instalments of Ringgit Malaysia One Million Two Hundred and Forty Thousand (RM1,240,000.00) only and a final instalment of Ringgit Malaysia One Million Two Hundred Sixteen Thousand One Hundred Fifty Nine and Sen Ninety Nine (RM1,216,159.99) only commencing from the twenty fourth (24th) month from the date of first drawdown of the Reinstated Facilities herein. The Borrower shall have the option of an alternative mode of repayment in the form of progressive redemption as exemplified hereinbelow under Clause 12.2 in the direct order of maturity.

[139] While cl. 12.2 of the 1999 agreement stipulates as follows (see p. 45 of ACB (1)):

> 12.2 As provided under Clause 12.1 hereinbefore, the Borrower may repay the Restructured Facilities and the Reinstated Facilities by progressive redemption of the parcels contained in the said Building (excluding the Excluded Parcels) in the following manner: ...

[140] Clause 12.4 of the 1999 agreement is worded as follows (see pp. 46 to 47 of ACB (1)):

> 12.4 The abovesaid progressive redemption shall be utilised for the full repayment of the Restructured Facilities and the Reinstated Facilities and in the event that the abovesaid progressive redemption exceeds the Restructured Facilities and the Reinstated Facilities and/or other amount due herein, the said excess shall be utilised for the purpose of repayment under Clause 10 of the Additional Facility Agreement SUBJECT ALWAYS to the provisions of Clause 13.3.

[141] Now, the words "Reinstated Facilities" and "Restructured Facilities" are defined in the 1999 agreement in this way (see pp. 36 to 37 of ACB (1)):

Reinstated Facilities :	The facilities to be granted by the Agent and the Lenders to the Borrower for a sum equivalent to Ringgit Malaysia Fifteen Million (RM15,000,000.00) only pursuant to this Supplemental Facility Agreement and which was not utilised by the Borrower under the Existing Facilities and more particularly referred to at Clause 3.3.
Restructured Facilities:	The Restructured Facilities as more particularly referred to at Clause 3.2 herein comprised of the Restructured Tranche I, Restructured Tranche II and Restructured Tranche III.

[142] It is crystal clear that cls. 12.1, 12.2 and 12.4 of the 1999 agreement relate to redemption payments which were meant to pay the principal and cl. 12.6 of the 1999 agreement relate to payments made by the first respondent as the borrower which go towards the payment of interest.

[143] Put in another way, the respondents must make redemption payments as well as servicing the interest. The redemption payments would go to settle the principal first, and, on top of that, the respondents must service the interest. These two responsibilities must be shouldered by the respondents.

[144] The High Court Judge also failed to consider the appellant's evidence that the first respondent had to repay the loan, under the 1999 first restructuring, in the following manner:

(a) If repayments were by way of instalments, then the repayment of principal would commence twenty four (24) months from the date of the first drawdown. And, in the meantime, the first respondent must still make payments to service the interest.

(b) If repayment was by way of a redemption, then such repayment would go to settle the principal and nothing else.

[145] The appellants' evidence showed that if redemption payments were utilised towards paying the interest first, then this would give rise to a situation where all the security may have been redeemed but the principal loan remains outstanding. This piece of evidence was not considered by the High Court Judge. At this juncture, it is ideal to refer to the evidence of DW1 at p. 1101 of ACB (2), at Tab "8" and his testimony speaks a thousand words:

25 Please refer to the letter dated 19.10.2000 from SSB to Aseambankers, at page 584, Bundle C. Can you please clarify this letter?

A25 Again SSB, by this letter was requesting for waiver of conditions for drawdown, including indulgence on the interest in arrears and waiver of the DSRA requirement. This shows SSB has always been aware it was in arrears of interest payments to the Lenders.

26 SSB has now taken the stand that it was never in arrears of interest and that the payments made by SSB to the Lenders should be sufficient to service the interest. Can you please clarify?

A26 From my recollection, I believe the redemption payments made by SSB were used to reduce the principal and this was known and agreed to by all parties. The reduction of principal would result in less interest being paid by SSB.

SSB never disputed at the material time that it was in arrears of interest and in fact, admitted it on several occasions.

[146] This would be followed by the evidence of Ee Hock Huat (DW4) at p. 1181 of ACB (2), at Tab "11" and his testimony is self-explanatory:

6 Did SSB thereafter default under its restructured facilities in 1999/2000?

6A Yes. Based on KBB's records, I believe it was because certain conditions were not complied with including SSB's failure to make any payment to service monthly interest under the restructured facilities despite reminders. SSB had also failed to maintain 6 months' worth of interest in the Debt Service Reserve Account ('DSRA') as was required by the Supplemental Facility Agreement and the Additional Facilities Agreement of 7.12.1999.

7 SSB alleges that they would not be in arrears of interest if the redemption payments at the material time were utilised towards interest instead of principal. Please clarify this.

7A Any redemption payments would go towards reduction of principal as this was agreed between the parties and would result in SSB incurring less interest. From KBB's records, all parties were aware of this and SSB did not complain at the time that any redemption payments should be used to pay off interest instead of principal. It would also be contrary to commercial practice for redemption to go to interest first instead of principal as otherwise this could result in the discharge of security while principal is not reduced.

[147] Finally, the evidence of Noor Hayati binti Baharuddin (DW5) at p. 1196 of ACB (2), at Tab "12" and her testimony merits reproduction:

7 SSB has alleged that they would not have been in arrears of interest if the redemption payments were used to pay off interest instead of principal. What do you say to that?

7A It was agreed by all parties that redemption payments would be utilised towards reduction of principal first. This was necessary as the redeemed unit in the Project would have to be released by Aseambankers and disclaimed as security for the facilities. It will also assist SSB in being liable for less interest under its facilities. SSB was well aware of this and had never complained of this at all material times. In fact,

SSB had admitted that they were in arrears of interest on several occasions, by letters and in meetings with the Lenders.

[148] The redemption payments benefitted the first respondent because it would reduce the principal outstanding and the first respondent would end up paying less interest under the facilities. This was not disputed by the respondents at all.

[149] To compound the matter further, the High Court Judge also failed to consider the following salient evidence:

(a) that the first respondent knew of the terms of the facilities and had admitted it was in arrears of interest at the material time and sought for indulgence of time from the appellants to settle the outstanding arrears of interest;

(b) that the first appellant had granted indulgence and issued a letter dated 26 May 2000 to the first respondent and advised the letter that future drawdown shall only be allowed subject to regularisation of overdue interest and the need to deposit the required amount of money in the DSRA (see pp. 58 to 59 of ACB(1));

(c) that the first respondent by its letters dated 19 October 2000 and 29 November 2000 addressed to the first appellant as seen at p. 62 to 65 at ACB(1) admitted that they were in arrears of interest and requested for a waiver of the DSRA's six months interest requirement as well as indulgence in regard to the payment of interest; and

(d) that the first appellant sent two letters to the first respondent dated 11 October 2000 and 17 October 2000 as seen at pp. 60 to 61 of ACB(1) for the purpose of updating the first respondent in regard to the servicing of the interest and the depositing of monies into the DSRA in order to service the interest.

The Respondents Admitted That The Conditions For Drawdown Have Not Been Met

[150] PW1, the first respondent's own witness, had admitted that the first respondent had not complied with the conditions precedent for drawdown and that the first respondent was in arrears of rental and, consequently, the appellants had the right to refuse drawdown. At Tab "1", at pp. 466 to 467 of ACB(2), PW1 testified as follows:

Counsel

Are you aware that condition for Tranche C was not met?

PW1

I agree. But we already applied for indulgence.

Counsel

But do you confirm, although you applied for indulgence it is still up to lender whether to grant or not?

PW1

Yes.

Counsel

Because do you agree if the conditions were not met, they have asking *(sic)* (the) right not to allow drawdown in Tranche C?

PW1

Yes.

[151] It is also pertinent to mention that the High Court Judge remarked that the appellants had admitted that the first respondent had complied with the conditions precedent. This remark is incorrect because the appellants had only admitted that the first respondent had complied with the conditions precedent for the three previous drawdowns under the 1999 first restructuring. The High Court Judge's own view was that the conditions precedent must be satisfied prior to each subsequent disbursement in accordance with the provisions of the 1999 agreement (see p. 106 of the appeal record at jilid 2/44).

[152] It must be borne in mind that the High Court Judge's finding that the appellants had misapplied the redemption payments and that the first respondent was not in default of the interest payment in July 2000, was clearly wrong. With respect, the High Court Judge completely failed to consider the first respondent's own admissions on this matter.

And Even If Redemption Payments Were Utilised Towards Interest, The First Respondent Would Still Be In Default

[153] Now, it would be a correct assertion to make that the first respondent would still be in arrears of interest even if the redemption payments had been utilised to pay the interest and not the principal. With due respect, the High Court Judge failed to consider the following salient evidence:

(a) detailed statement of accounts as seen at pp. 67 to 68 of ACB(1) prepared by the appellants showed that even if the redemption payments were used towards interest, the first respondent would still be in default of interest; and

(b) the first appellant's witness by the name of Khalijah binti Ismail (DW2) confirmed that the first respondent would still be in default of interest amounting to RM695,905.80 as at July 2000 (the relevant date when the drawdown was refused) (see the witness statement of DW2 at Tab "2", at pp. 1146 to 1147 of ACB(2)).

[154] It is interesting to note that in the grounds of judgment at p. 96 of the appeal record at jilid 2/44, the High Court Judge seemed to agree with the above assertions, and found that the first respondent would still be in arrears of interest amounting to RM400,091.81 as at 30 June 2000 even if the redemption payments had been utilised towards paying the interest instead of the principal. Thereafter, the High Court Judge considered the monies kept in the DSRA and the FD of RM2 million that was placed with the fourth appellant.

Uplifting DSRA Or RM2 Million FD

[155] The first respondent contended and was agreed to by the High Court Judge that the arrears of interest of RM400,091.81 as at 30 June 2000 "could easily have been settled" by adopting the following methods:

(a) uplifting the sums in the DSRA; and

(b) uplifting the RM2 million FD pledged by the second respondent to the fourth appellant.

[156] The DSRA is different from the FD. While the DSRA is a special account, in the form of security given to the appellants where at least six months' worth of interest must be placed therein, the FD, on the other hand, concerned a sum of RM2 million that was deposited by the second respondent with the fourth appellant under a separate and different transaction.

[157] The High Court Judge erred, with respect, when she failed to consider the undisputed evidence that the respondents themselves never requested the appellants to utilise either the DSRA or the RM2 million FD to settle the arrears in interest.

A The FD Of RM2 Million That Was Pledged With The Fourth Appellant

[158] The issue pertaining to the FD only surfaced in 1999 – to be precise on 26 April 1999, and it was for the sole purpose of
B persuading the fourth appellant to participate in the proposed 1999 first restructuring of the facilities. To achieve that purpose, the second respondent being the guarantor and the main director and shareholder of the first respondent, entered into a private arrangement with the fourth appellant where a sum of RM2
C million FD was pledged by the second respondent solely in favour of the fourth appellant.

[159] To put it bluntly, the FD was pure and simple a private arrangement between the second respondent and the fourth appellant. According to Saroja Devi K Gopalan (DW6), the
D monies were meant exclusively for the fourth appellant and were not made known to the other appellants at all. DW6 also said that the monies were not part of the security for the syndication. The High Court Judge failed to consider DW6's testimony and the testimonies of all the other bankers that they did not know of the
E existence of the FD with the fourth appellant. That being the case, the FD could not be used towards the payment of arrears of interest under the syndicated loan.

[160] The 1999 agreement did not disclose that there was a RM2
F million FD pledged to the fourth appellant by the second respondent. The appellants' testimony showed that if the FD was meant to be security for the syndication and the appellants knew about this at that material time, then the FD would be pledged to the first appellant and not to the fourth appellant. This was not
G even considered by the High Court Judge.

[161] I will now allude to the evidence which showed that the RM2 million FD deposited by the second respondent was exclusively meant for the fourth appellant. For starters, I will refer
H to the letter of offer dated 26 April 1999 that was issued by the fourth appellant to the second respondent and not to the first respondent. That letter can be found at pp. 70 to 73 of ACB(1). The first paragraph of that letter reads as follows:

I

> We refer to the above matter and the meeting held on 20 April 1999. At your request, we are agreeable to participate in the Proposed Additional Syndicated Bridging Loan Facility of RM32.0 Million (BFB's portion: RM9.472 Million) subject to the pledge of a Fixed Deposit of RM2.0 Million in our favour and the perfection of the security documents.

[162] This would be followed by the fourth appellant's letter of 14 September 2001 as seen at p. 84 of ACB(1) which reads as follows:

> Note: For Item 2 and 3, there is a difference in calculation in Alliance Finance Bhd and the Agent Bank calculation due to timing and set-off against pledge of fixed deposit exclusively and separately to Alliance Finance Bhd.

[163] Next, it would be the evidence of the four bankers who testified for the first to the third appellants to the effect that the appellants did not know about the FD pledged in favour of the fourth appellant. In answer to the question posed, DW6 testified as follows (see p. 1211 of Tab "13", at ACB(2)):

> 6 Did Aseambankers, as agent bank, and the other Lenders know of the Fixed Deposits pledged by Dato' Richard Lee to Bolton Finance?
>
> 6A No. Aseambankers or the other Lenders were not informed as this was a private agreement between Bolton Finance and Dato' Richard Lee, where in consideration of Dato' Richard Lee pledging the said monies to Bolton Finance, Bolton Finance agreed to restructure SSB's facilities and grant further monies. These fixed deposit monies were independent of the security provided for all the syndicated Lenders under the syndicated facilities and were not intended to be shared with the other Lenders. Our records do not show that Bolton Finance ever informed Aseambankers or the other Lenders regarding the fixed deposits pledged by Dato' Richard Lee.

[164] Finally, if it was true that the RM2 million FD was indeed meant as security for the syndicated facilities, why was there no explanation offered by the respondents that the said FD was not pledged in favour of the first appellant as the agent bank? In their submissions, the respondents admitted that the second respondent pledged the FD to the fourth appellant in order to ensure that the fourth appellant would agree to cooperate to the first restructuring.

[165] With respect, the High Court Judge did not consider all these salient facts in regard to the RM2 million FD in her grounds of judgment.

[166] That being the case, the first appellant could not have possibly uplifted the FD monies with the fourth appellant to settle the interest in arrears. And there could not have been a "set-off" by debiting the first respondent's account with the FD sum because the FD belonged to the second respondent and not the first respondent.

[167] The High Court Judge did not blame the second respondent for creating the exclusive arrangement with the fourth appellant. The second respondent never requested the first appellant to uplift his FD with the fourth appellant to settle the first respondent's outstanding arrears in interest. And this is not a disputed fact.

[168] But, by way of a reiteration, it must be emphasised that the second respondent had already requested the fourth appellant to uplift the FD amounts to settle the interest due from the first respondent to the fourth appellant from November 2000 to June 2007.

Upliftment Of The DSRA To Settle The Interest In Arrears

[169] The High Court Judge held that the appellants should have uplifted the monies in the DSRA to settle the arrears in interest. With respect, the High Court Judge overlooked and failed to consider that the DSRA amounts were in fact uplifted in July and September 2000 to service the interest and notwithstanding such upliftment, the first respondent was still in arrears of interest.

[170] The following facts were not considered by the High Court Judge:

(a) That the DSRA was a reserve account meant to be a form of security for the facilities and there must be consensus of all the appellants before it is uplifted. In July 2000, there was only one month's worth of interest in the DSRA instead of the required six months under the terms of the supplemental facility agreement particularly cl. 14.27 at pp. 50 to 51 of ACB(1).

(b) All the appellants agreed and they had instructed the first appellant to uplift the DSRA in July and September 2000.

(c) That the first respondent had never requested for the monies in the DSRA to be uplifted to pay the arrears in interest. It is pertinent to refer to the testimony of the first respondent's executive director by the name of Teoh Hock Soon (PW3) as seen at Tab "3", at p. 691 of ACB(2). There the questions and answers were in this manner:

Counsel

Are you aware that DSRA account is a separate account and any monies in it can only be used to reduce SSB's facility only if ASEAM and Lenders consent to it?

PW3

Yes.

Counsel

Are you aware that the sum RM286,247 only represent about one month interest?

PW3

Yes.

(d) The statement of account which was prepared by the first appellant as seen at p. 67 of ACB(1), which incorporated the actual dates the DSRA monies were uplifted, showed that the first respondent would still be in arrears of interest.

Breach Of The DSRA Requirements

[171] The first respondent was in arrears of interest and failed to maintain the required six months' worth of interest in the DSRA and because of this, the appellants refused to allow further drawdown.

[172] The High Court Judge held that the appellants should not be allowed to refer to the first respondent's failure to comply with the DSRA requirements as one of the grounds to refuse drawdown in July 2000 because it was not specifically pleaded in the statement of defence.

[173] The appellants argued that the High Court Judge had gone far beyond the respondents' pleadings and held that the appellants were liable based on causes of action which were not pleaded by

A the respondents at all. The appellants further argued that the High Court Judge had referred to the DSRA and had erroneously stated that the DSRA monies could have paid off the arrears.

[174] The appellants pointed out that this issue had been B pleaded in the appellants' defence. Flowing from this, a perusal of the grounds of judgment of the High Court Judge showed that the following matters were not considered:

(a) That the appellants had categorically denied in their defence C that all the conditions precedent for the drawdown had been fulfilled. In fact, the DSRA requirements that there be at least six months' worth of interest deposited had not been fulfilled.

(b) That the first respondent referred to the DSRA and argued that the monies in the DSRA should have been used to settle D the arrears of interest. In response, the appellants were certainly entitled to adduce evidence pertaining to the requirements under the DSRA which would show that the first respondent was in arrears of interest.

E (c) In regard to the issue of the DSRA, there was no element of surprise at all (*KEP Mohamed Ali v. KEP Mohamed Ismail* (*supra*), at p. 12).

[175] It must be recalled that the first respondent had admitted that it had failed to comply with the conditions precedent for F drawdown and that would include the failure on the part of the first respondent to comply with the DSRA requirements. However, these admissions of the first respondent were not considered by the High Court Judge.

G The Contradictory Findings Of The High Court Judge In Regard To The Appellants' Obligation To Allow Drawdown

[176] Under this head, the High Court Judge made the following contradictory findings:

H (a) That since there was a binding contract between the appellants and the first respondent, the appellants cannot withdraw from the commitment to lend.

(b) The appellants could withdraw from such commitment based I on the "Bentworth principle" by looking at the common understanding of the parties. But this was said to be irrelevant because the appellants were relying on the express clauses of

the 1999 agreement which stipulated that there was no obligation to continue drawdown unless the conditions precedent for each drawdown were met.

[177] There is no legal obligation on the part of the lender to continue to allow the borrower to drawdown on the loan when the conditions precedent have not been satisfied and when there were defaults on the part of the borrower in relation to its contractual obligations. This proposition of law is captured in the "*Encyclopaedia of Banking Law*", Binder 1A, at para. 3224 which states as follows:

> Loan agreements provide that the bank is not obliged to lend unless certain conditions are satisfied - the 'conditions precedent'. These are not conditions to the coming into force of the agreement which comes into force on signature: they are conditions to lending.

[178] Continuing at para. 3225, the learned authors wrote:

> The conditions to each loan separately are to ensure:
>
> – That all legal and financial matters are still in order prior to each separate borrowing. Hence the warranties must continue to be correct as if repeated. A bank should not be liable to lend if a subsequent legal defect has arisen, eg the introduction of an exchange control prohibiting the borrower from making payments to foreign creditors.
>
> – That the bank is not obliged to lend if it is only a matter of time before a default occurs (the borrower must not rob Peter to pay Paul) and to reduce the possibility of throwing good money after bad. Hence there must be no event of default or pending event of default. Grace periods are removed from the events of default for this purpose.

[179] Various clauses in the 1999 agreement were not considered by the High Court Judge and these clauses only allow drawdowns if there are no defaults and if all the conditions precedent have been fulfilled. The clauses in the 1999 agreement that were not considered by the High Court Judge may conveniently be summarised as follows:

(a) Clauses 5.1.2 and 5.1.3 as seen at pp. 40 to 41 of ACB(1);

(b) Schedule 4 at para. 1(d) as seen at pp. 53 to 54 of ACB(1);

(c) Events of default in cls. 17.1 and 17.1.2 as seen at p. 52 of ACB(1);

(d) Clauses 9.4.1 and 9.4.2 as seen at p. 44 of ACB(1); and

(e) Clause 14.27(a) as seen at p. 50 of ACB(1).

[180] The law is also settled that a lender may refuse drawdown if there are arrears in interest (*Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* (*supra*); *Delta Enterprises Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor* [2005] 1 CLJ 501; [2005] 3 MLJ 293, CA; and *Lim Chee Holdings Sdn Bhd v. RHB Bank Bhd* [2005] 4 CLJ 305, CA).

The Internal Memorandum Dated 23 May 2002

[181] Mr Tan Keng Teck submitted that the appellants withheld funding because the first respondent had defaulted in interest payments. But he submitted that this reason is now found to be untrue based on the internal memorandum of the first appellant dated 23 May 2002. He submitted that a different reason for withholding funds was stated in the internal memorandum and that was:

> The Lenders are not willing to grant additional loans to Shencourt to complete the Ampang Galaxy Project. On Aseambankers' part, we are already over exposed to the Broad Property Sector and does not have the capacity to further lend to the property sector.

[182] Mr Tan Keng Teck argued that based on the internal memorandum, the appellants deliberately put forward a false case that further drawdown of funds was refused because the first respondent was in arrears of interest when the truth of the matter was that it was a policy decision which had nothing to do with the existing contract between the parties.

[183] Flowing from this, Mr Tan Keng Teck submitted that the High Court Judge cannot be faulted in making findings against a party who presents a false case. Indeed, the High Court Judge made the following observations as seen at pp. 113 to 114 of the appeal record at jilid 2/44:

> Secondly, in the course of the trial, the defendant was at pains to downplay the significance of this Internal Memorandum. It was more infernal given the implication.

One of the signatories of the said Internal Memorandum one, En. Ahmad Saifuddin Morat was subpoenaed but evaded service several times and came to court only after he was on the brink of being held for contempt of court.

His testimony concerning the said Internal Memorandum was evasive at best, and downright unreliable at worst. In any case, the Internal Memorandum prepared by the officers of the defendant clearly stated that the defendant and Co-Lenders were unwilling to provide any further financing to the plaintiff for the construction and completion of Phase 1 of the Revised Project, as the defendant and Co-Lenders were over-exposed in their overall lending to the property sector.

Nothing could be more stark than this, in the revelation of the defendant's and Co-Lender's position *vis-a-vis* the plaintiff and the loan facility. The cross-examination of the relevant witnesses bear this out. Clearly, the extent of the defendant's and Co-Lender's malice went past any fear of being held in contempt.

In view of the above, I find that the defendant had ulterior motives in not providing financing to the plaintiff; which now puts the jigsaw of missing parts of the defendant's incomprehensible conduct, into place. The defendant had unreasonably refused to allow the plaintiff to drawdown the loan facility. The defendant and Co-Lenders acted maliciously in depriving the plaintiff of the said facility and this put paid to the plaintiff's construction and completion of the Revised Project, escalating the plaintiff's loss and damages suffered, for the non-completion of the same.

As can now be seen, the defendant and Co-Lenders had no intention of providing any financing to the Revised Project since clearly their rationale for refusing to provide financing was predicated on the non-payment of interest and principal which was untrue.

Clearly, the extent of the defendant's and Co-Lenders' malice went past any fear of being held in contempt. As could be seen in the course of trial, the Internal Co-Lenders' own witnesses as to the existence of the documents bear this out.

[184] Quick on the uptake, Madam Yoong Sin Min submitted that the High Court Judge's finding that the appellants were over-exposed to the broad property sector or lacked capacity to advance further monies to the respondents cannot be upheld. She submitted that in fact, the appellants had granted further financing in 1999 as well as in 2004. This, according to her, cannot be disputed.

[185] With respect, the High Court Judge failed to consider that:

(a) The allegations in regard to "over-exposure to the broad property sector" was only made against the first appellant. It cannot be directed against all the appellants and the finding against all the appellants without any evidence cannot be accepted.

(b) In fact, the second to the fourth appellants testified that they were not over-exposed to the broad property sector at the material time.

(c) It is wrong to say that the second to the fourth appellants conspired with the first appellant to "maliciously engineer a default of the facilities". There was no basis for the conspiracy theory.

(d) V Saraswathy a/p Varadarajan (DW3), the Vice President and the head of the corporate credit & agency, debt markets of the first appellant, had testified under oath and said that the first appellant was not over-exposed to the broad market sector and she had provided figures to support this (see answers 6A and 7A of DW3's witness statement in evidence-in-chief at p. 1155 of ACB(2), Tab "10").

[186] The appellants objected to the internal memorandum particularly as to its authenticity for the following reasons:

(a) The first appellant had no record of such internal memorandum in their records. The copy exhibited was a photocopy of an alleged fax copy.

(b) The internal memorandum was wrongly formatted.

(c) The internal memorandum was unsigned by the relevant senior officer. DW1, the head of the business banking with the third appellant, testified by way of a witness statement in his examination-in-chief, as follows (see pp. 1115 to 1116 of ACB(2), at Tab "8"):

> 47 Please refer to page 970, Bundle E. This is a document produced by SSB which appears to be an Internal Memorandum of Aseambankers dated 23.5.2002. Can you clarify what is this document?

A47 (a) I do not recall this but I certainly did not sign this document. It is also an unusual memorandum, as usually, for matters for management approval, we put it in a Memorandum to the Credit Underwriting Committee and not the Board of Directors, as is seen in this document at page 970, Bundle E. This was a draft memo which was not submitted. In any event, Aseambankers had recommended to its management that the existing facilities amount be crystallised at RM38.5 million and such debt is to be restructured. Aseambankers management agreed to this.

(b) What I do recall is that SSB informed the Lenders that since MAA was not allowed to fully take over the syndicated facilities, SSB would like to restructure their existing syndicated facilities whilst obtaining fresh financing from MAA. Each Lender had to seek its management's approval for such restructuring.

48 I refer to page 973 Bundle E, para 4.1 of that document, and page 974, para 6.1. Do you agree with the statements that Aseambankers cannot lend further to SSB due to over exposure to the property sector?

A48 I cannot recall that but I remember there were some restrictions imposed by BNM on financing the broad property sector but now I cannot remember the details. However it has never affected the decision of our management to approve the restructuring.

(d) When asked to explain as to how the first respondent had possession of the internal memorandum, PW1 merely said that "someone had mistakenly put it in my file" (see the cross-examination of PW1 (second respondent) at p. 621 of ACB(2), at Tab "1").

[187] The first appellant challenged the internal memorandum by calling witnesses in the persons of DW1 and DW3. And DW3 testified at p. 1155 of ACB(2), at Tab "10" as follows:

> The purported internal memorandum is thus wrong and I wish to emphasise that this internal memorandum was never approved and is not in any of Aseambankers' records.

[188] It was wrong for the respondents to argue that the banks did not dispute the authenticity of the internal memorandum. The appellants alluded to para. 16 of the defence where the first

appellant made reference to the internal memorandum dated 5 June 2002 (see p. 35 of the Ikatan Pliding at Tab "2") whereas the disputed internal memorandum referred to by the respondents bore a different date, namely, 23 May 2002.

[189] At the trial proper, the internal memorandum dated 23 May 2002 was referred to by the respondents. The appellants disputed this internal memorandum because the first appellant had neither seen it nor had a record of it. It was for this reason that the appellants informed this court that the internal memorandum dated 23 May 2002 as seen at p. 371 of ACB(1) was still marked as "ID28" and not "P28".

[190] Learned defence counsel for the respondents pointed out that this internal memorandum was referred to in the first appellant's affidavit in reply affirmed on 8 July 2005. But a close scrutiny of the said affidavit in reply showed that the internal memorandum that was referred to was dated 5 June 2002 whereas the disputed internal memorandum bore a different date, namely, 23 May 2002.

[191] DW3 was cross-examined in regard to the internal memorandum referred to in the first appellant's affidavit in reply affirmed on 8 July 2005 as well as the internal memorandum referred to by the respondents during the trial, and she confirmed that there were two internal memorandums. The evidence of DW3 can be seen at pp. 934 to 935 of ACB(2) at Tab "6" and it was to this effect:

> Counsel
> Counsel put it to you a question such that para 20 referred to a disputed internal memo. Can I refer you to Bundle E page 970 - P29. This is the internal memo you stated is not enclosed in ASEAM's report. Please give date of memo.
>
> DW3
> It is stated 23.5.2002.
>
> Counsel
> At para 20, what is the date of the memo stated there?
>
> DW3
> It is 5.6.2002.

[192] Both DW1 and DW3 categorically confirmed that the disputed internal memorandum was not kept in any of the first appellant's records. But, with respect, such evidence was not addressed or considered by the High Court Judge at all.

[193] Furthermore, the High Court Judge did not address the suspicious circumstances surrounding the second respondent's discovery of the disputed internal memorandum in the light of what the second respondent said that "someone had mistakenly put it in my file".

[194] The High Court Judge decided to admit the disputed internal memorandum and held that it was authentic based on the evidence of Ahmad Saifudin (PW4) who could not say that he never had sight of the internal memorandum and that PW4 claimed that the signature there was not his because of the difference in size of the signature appearing thereon. With respect, the High Court Judge arrived at these conclusions without reverting to the actual testimony of PW4 which can be seen at pp. 720 to 721 of ACB(2) at Tab "4", which was to this effect:

Counsel

When you joined Maybank Securities in 2002, did you look at the file of SSB at all?

PW4

No.

Counsel

Were you given (the) opportunity to look at the document just now before being questioned?

PW4

No. Only during that time. I just saw it just now.

Counsel

See page 970 Bundle E. Have you seen original of document?

PW4

No. And my signature looks different.

Counsel

Is this the reason why you are not sure that it was you who prepared the document?

PW4

Yes. Firstly the signature look different. Secondly Encik Rozidin did not sign. Thirdly memo like this would be to Credit Underwriting Committee and not to Board of Directors. And fourthly it was some time ago in 2002.

[195] Continuing at p. 723 of ACB(2) at Tab "4", PW4 had this to say:

Court

(Showed PW4 photocopy of the document). Shown to PW4.

PW4

This is the same document as ID 28. On a 50-50 basis. I cannot be sure of the authenticity of this document because:

(1) It is addressed to Board of Directors when our procedure is, it is normally addressed to Credit Underwriting Committee.

(2) My signature in the document is different from my signature in other documents - e.g. page 951.

(3) There is no seal of approval or rejection. There is no decision on this paper.

(4) All the signatories must sign. Here, one signatory Encik Rozidin did not sign. So I cannot verify its authenticity.

[196] Madam Yoong Sin Min submitted that even if the evidence of PW4 could be accepted that it was PW4 who had signed the Internal Memorandum, it cannot be overlooked that PW4 was the most junior of the officers in terms of ranking and the fact that when PW4 was issued a subpoena and at the time when he gave evidence in court, he was no longer employed by the first appellant. That being the case, Madam Yoong Sin Min submitted that PW4's evidence cannot be taken to show that the internal memorandum was that of the first appellant or even that of the banks in question. She lamented that it was a deep mystery as to how the internal memorandum came into the hands of the second respondent.

[197] It must be borne in mind that DW1, who was the Senior General Manager of the first appellant and PW4's boss, had categorically stated that he could not recall the disputed internal memorandum because it was not the usual memorandum and that the format was wrong and that he did not sign it.

[198] DW3, the current senior officer of the first appellant, testified that there is no such record of this disputed internal memorandum.

[199] Notwithstanding that the disputed internal memorandum was confined only to the first appellant, yet the respondents by one stroke of the brush made a sweeping conclusion that all the appellants are over-exposed to lendings in the broad property sector. This cannot be right. In fact, in 2004, the appellants granted further financial assistance to the respondents.

[200] With respect, the High Court Judge was influenced by this disputed internal memorandum. Her Ladyship did not consider that:

(a) the disputed internal memorandum was not signed by DW1 – the relevant senior officer at the material time;

(b) the disputed internal memorandum was not addressed to the correct body;

(c) the disputed internal memorandum was not found in the records of the first appellant;

(d) the disputed internal memorandum bore the date 23 May 2002 and it was not relevant to the issue of why the appellants did not allow the drawdown in July 2000; and

(e) the disputed internal memorandum relate to the first appellant only and not to the second to the fourth appellants at all.

[201] In accepting the contents of the disputed internal memorandum, the High Court Judge did not consider the evidence of DW3 who categorically denied that the first appellant was over-exposed to the broad property sector. The High Court Judge further failed to consider that the appellant did in fact grant further financial advances to the respondents in 1994 and 2004.

Estoppel

[202] Legally speaking, the first respondent should be estopped from advancing its claim based on issues which had occurred prior to the 2003 second restructuring because, at the material time, the first respondent had not complained or protested about the alleged breaches. These alleged breaches concerned matters prior to the 2003 second restructuring and they may be itemised as follows:

(a) that the appellants failed to allow further drawdown under the 1999 first restructuring facilities in July 2000;

(b) that the appellants should have utilised the FD monies given to the fourth appellant by the second respondent towards the payment of arrears in July 2000;

(c) that the appellants refused to allow further drawdown under the facilities despite the production of the feasibility reports about the project in July 2000;

(d) that the appellants refused and failed to promptly issue a redemption statement for the facilities in 2001/2002; and

(e) that the appellants required an upfront payment of RM8.5 million to be paid from the MAA loan despite the fact that the appellants knew that this would create a shortfall of funds for the first respondent to complete the project in 2002/2003.

[203] Now, all these alleged breaches occurred prior to or during the 2003 second restructuring and the first respondent merely kept quiet and did not complain then. Consequently, the first respondent must be estopped from complaining since it had entered into the 2003 second restructuring agreement without reserving its rights and had induced the appellants to do so, to the detriment of the appellants.

[204] A perusal of the grounds of judgment of the High Court Judge would show that there was a failure to consider or address the issue of estoppel. In short, the issue of estoppel was not considered at all by the High Court Judge in her grounds of judgment.

[205] Lord Denning MR in *Moorgate Mercantile Co Ltd v. Twitchings* [1976] 1 QB 225 at p. 241; [1975] 3 All ER 314 at p. 323, CA, described "estoppel" as a principle of justice and equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so. It is the person who made the statement, promise or assurance who is estopped from denying or going back on it.

[206] Again, Lord Denning in *Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84, at p. 122; [1981] 3 All ER 577, at p. 584; [1981] 3 WLR 565, at p. 575 aptly said that: A

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. B C D E

[207] In *Panwell Pte Ltd & Anor v. Indian Bank (No 2)* [2002] 4 SLR 963, Justice Tan Lee Meng of the High Court of Singapore was concerned with a restructuring arrangement in 1990 between the borrower and the defendant bank for reduced amount and the parties relied on this agreement in their subsequent conduct. In 2001, the defendant bank resiled and asserted that the restructuring agreement was not binding as the borrower had accepted the arrangement out of time and still owed the original debt. In allowing the borrower's claim, His Lordship applied the doctrine of estoppel and held at p. 976 of the report as follows: F G

> 63 In the face of the overwhelming evidence that after May 1998, both the Indian Bank and Panwell acted upon the agreed assumption that the terms of the 1990 offer were in force and that Panwell altered its position as a result of this common assumption, it is now far too late and most inequitable for the bank to resile from the accepted position. H

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[208] In *AIB Group (UK) plc (formerly Allied Irish Banks plc and AIB Finance Ltd) v. Martin and Another* [1999] All ER (D) 270, Jacob J held that where a borrower signed a restructuring agreement and then denied its terms, an estoppel would be activated. This was what His Lordship said:

> Mr Cousins, on behalf of the Bank, alternatively submitted that Alan, having signed the facility letter, was estopped from disputing that he was to become liable for £1.71m of the debt by way of the restructure. Having reached the conclusion I have it is not necessary for me to deal with this point but since it was argued I will. Mr Cousins relied upon *Amalgamated Investment v. Texas Commerce* [1982] QB 84. Two members of the court approved the following passage from Spencer Bower & Turner, 3rd edn, 1977, at 157:
>
> > When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.
>
> Mr Ashe did not challenge the legal principle. He said there was no common assumption here. In particular the Bank, but not Alan, thought that Alan had liability under the 008 account. So that fundamental misunderstanding vitiated any common assumption. However, it is not that simple. When Alan signed he thought the partnership's indebtedness was about £800K. By signing he accepted an indebtedness of £1.71m and he knew that Mr Martin had debts beyond that figure (from the first special condition) as he fairly accepted under cross-examination. I did not in the end ever find out where Alan thought the figure of £1.71m came from. The fact is he accepted it and from then on there was a common assumption as to the amount.
>
> It may be said that the common assumption as to the amount was coupled with an assumption that there would be 46 properties as security. That was certainly Alan's position when he signed but that is not an assumption relating to the amount of the partnership's joint indebtedness. I think Mr Cousins is right on his estoppel point.

[209] Here, we have a situation where the first respondent had not only kept silent but had admitted that it was in arrears of interest in default and had failed to comply with the conditions precedent for the drawdown in 2000.

[210] To compound the matter further, the first respondent had never requested the first appellant to act on the second respondent's FD with the fourth appellant. The first respondent had also sought indulgence from the appellants and the appellants had granted various indulgences to the respondents.

[211] The first respondent had also entered into the 2003 second restructuring with very generous terms and had also obtained further loans from the appellants. Since 2000, the first respondent had not paid any monies to the appellants and there was only one payment that was made in 2003 out of MAA's loan.

[212] All these complaints of the respondents occurred prior to the second restructuring in 2003 and by their conduct, the respondents must be estopped from regurgitating those complaints.

[213] The stand of the appellants was quite simple. As a result of the first respondent's actions and conduct, the appellants had altered their position and suffered to their detriment when the appellants:

(a) granted further loans;

(b) agreed to reduce and restructure the respondents' liabilities;

(c) granted further indulgence without being repaid; and

(d) had to share their security with MAA.

[214] All these were not considered by the High Court Judge. It is crystal clear that the first respondent as the borrower and the second respondent as the guarantor had greatly benefitted from the syndicated loans. The doctrine of estoppel must be vigorously applied by this court.

Dismissal Of The Appellants' Loan Recovery Claims – Suit No: 443

[215] It must be emphasised that both the first and the second respondents did not dispute that the first respondent had utilised the facilities and they too did not dispute as to the amount outstanding.

[216] But the High Court Judge found that the appellants are not entitled "to profit from their wrongdoing" and, consequently, they are disentitled to recover any part of the loans granted to the first respondent. The High Court Judge also ordered that the security for the facilities be released forthwith and discharged.

[217] The High Court Judge had generously applied the case of *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* (*supra*) in arriving at that decision. However, the *Perdana Merchant*'s case can readily be distinguished from the present appeal at hand. There, the dispute in *Perdana Merchant* went to the root of the facility agreement and the court found that the facility agreement signed by the borrower did not contain the same material term as that agreed upon by the borrower and the lenders, with the result that the validity of the entire facility agreement was disputed. The borrower in *Perdana Merchant* had not agreed to the facility and therefore was not liable for the monies paid out under the said facility. Moreover, the loan sums were paid to a third party in Germany and not to the borrower.

[218] By comparison, in the present appeal at hand, the validity of the loan agreements was never disputed. And it was not disputed that the monies disbursed had been utilised by the first respondent. The first respondent had also benefitted from the monies loaned by the appellants to finance Phase 1 of the project to completion. That being the case, there was no justification to totally exempt the respondents from their liability to repay the monies which they had received from the appellants and used to finance the project.

[219] The Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495, laid down a simple proposition of law. It is this. That a recovery claim is entirely separate from a claim for damages against the bank. In the words of Tun Dato' Seri Abdul Hamid bin Hj Omar LP, at p. 505 of the report:

> The dismissal of the Bank's counter claim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the Bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The Bank's claim for recovery of the loan was entirely a separate matter from the first respondent's claim for damages against the Bank. There is no ground in law for exempting the first respondent from liability to repay the loan.

[220] Madam Yoong Sin Min submitted that the High Court Judge's decision in dismissing the recovery claim meant that the first respondent got back the project land which has been improved by using the financiers' monies and the first respondent did not have to pay back to the appellants at all. Not even a cent. That, according to Madam Yoong Sin Min, cannot be right. The respondents also succeeded to secure an order that the appellants had to pay the MAA loan. This, according to Madam Yoong Sin Min, amounts to an unjust enrichment for the first respondent.

[221] Madam Yoong Sin Min complained that the High Court Judge's decision is now being used by borrowers by alleging breaches of fiduciary duties in order to avoid liability. According to her, the Association of Bankers are present in court to register their support to the appellants.

[222] It cannot be denied that the appellants have supported the first respondent since 1996 and they have assisted the first respondent through thick and thin and to weather the financial storm especially during the 1997/1998 financial crisis. But, as soon as the project was completed, the respondents went against their financiers and filed their claim in order to avoid making any repayment of the facilities.

[223] Madam Yoong Sin Min submitted that the judgment of the High Court Judge should not be allowed to stand because it would affect and prejudice all future lenders from the banking sectors. She submitted that on hindsight, the appellants would have been better off by recalling the facilities in 2000 rather than bending backwards to assist the first respondent. According to her, "it is devastating to the banking industry if a borrower can simply walk away without having to repay its loans".

Conclusion

[224] For the varied reasons alluded to in this judgment, the appeal by the appellants should be allowed and the decision of the High Court Judge is set aside. What this amounts to is this. That the first respondent's claim in Suit No: 665 is dismissed forthwith. That the appellants' recovery claim in Suit No: 443 is allowed, with judgment to be granted for the updated amounts, after taking into consideration a redemption payment that was

made in October 2007, as updated by DW3 in her witness statement at pp. 1160 to 1162 of the appeal record at jilid 13/44 in the following sums:

(a) RM47,232,496.11 being the balance outstanding under the restructured facilities as at 30 September 2008, comprising of:

(i) RM14,360,795.10 due to Affin Bank Berhad, the second appellant, as at 30 September 2008 with interest thereon at 2% per annum above the second appellant's base lending rate, capitalised annually, from 1 October 2008 to the date of full payment;

(ii) RM19,757,195.93 due to Malayan Banking Berhad, the third appellant, as at 30 September 2008 with interest thereon at 2% per annum above the third appellant's base lending rate, capitalised annually, from 1 October 2008 to the date of full payment; and

(iii) RM13,114,505.08 due to Alliance Bank Malaysia Berhad, the fourth appellant, as at 30 September 2008 with interest thereon at 2% per annum above the fourth appellant's base lending rate, capitalised annually, from 1 October 2008 to the date of full payment.

(b) RM50,000 due to Aseambankers Malaysia Berhad being agency fees as at 1 June 2008 and further agency fees of RM50,000 per annum to be paid on the 1 June every year until the date of full settlement of all sums due to the appellants, with interest thereon at the rate of 8% per annum from 2 June 2008 to the date of full payment.

[225] The counter claim of the respondents in Suit No: 443 is dismissed forthwith.

[226] Since the appellants succeeded in its recovery claim in Suit No: 443, costs should rightly be given to the appellants in the sum of RM120,000 here and below. The deposit is to be refunded to the appellants.

[227] My learned brother Linton Albert, JCA agrees with this judgment and that this judgment be the judgment of this court. My learned brother Mohamad Ariff bin Md Yusof, JCA has indicated that he would be writing a supporting judgment.

Mohamad Ariff Yusof JCA:

Procedural Background And The Parties To The Appeal

[228] This is my supporting judgment to that of my learned brother Abdul Malik bin Ishak, JCA.

[229] This appeal arises from two writ actions (Civil Suit No: D2-22-665-2005 and Civil Suit No: D2-22-443-2006) which were consolidated and heard together in the High Court. In the first suit ("Suit 665"), the present first respondent (Shencourt Sdn Bhd) is the plaintiff with the present first appellant (Aseambankers Malaysia Berhad) is the sole defendant. In the second suit ("Suit 443") the plaintiffs are Aseambankers Malaysia Berhad, Affin Bank Berhad, Malayan Banking Berhad and Alliance Bank Malaysia Berhad (hereinafter "Aseambankers", "Affin", "MBB" and "Alliance"), whilst Shencourt Sdn Bhd and Lee Kam Yoong (hereinafter "Shencourt" and "Lee") are respectively the first and second defendants. There is a counter claim by Shencourt and Lee against the plaintiffs in Suit 443.

[230] Suit 665, the earlier action in time, is a suit by the borrower (Shencourt) of a financing facility against the agent bank (Aseambankers) of a syndicated loan. Suit 443 is an action instituted by the agent bank and the co-lenders of the syndicated loan for the recovery of the loan against Shencourt as borrower and Lee as guarantor. The second suit has been aptly described, and referred to, as "the recovery action" by counsel, as opposed to the first suit which is essentially an action against the agent bank, although, as noted earlier, even in the second suit there is a counter claim by the borrower and guarantor against the agent bank and the co-lenders.

Summary Factual Background

[231] The background facts have been sufficiently set out in the judgment of the learned trial judge and fully expanded in the submissions of the parties. For the purpose of this appeal, it suffices to merely outline in summary form the salient major facts bearing on this dispute. Shencourt started a development of a mixed commercial complex known as "Galaxy Ampang" in 1995, comprising a shopping centre and an office block. The plan to construct the office block was later changed into a plan to construct service apartments. The project was initially financed by Bank Kerjasama Rakyat Malaysia Berhad, but in 1996 Shencourt

refinanced its loans through a syndicated loan arrangement with the present banks, ie, the appellants. It is common ground that Shencourt was not in default of its loans when it approached the present banks for the refinancing. The arranging bank and the security agent for the syndication is Aseambankers with Affin, MBB and Alliance as the lending banks or syndicated lenders. The syndicated loan consists of three tranches, comprising the following:

(a) Tranche A for RM28.5 million;

(b) Tranche B for RM15 million; and

(c) Tranche C for RM15 million, giving a total of RM62.5 million.

Tranches A and B were fully drawndown.

[232] In the first syndicated facility agreement dated 27 June 1996, the securities included an assignment of the project land, a debenture and a guarantee provided by Lee, a director and principal shareholder of Shencourt.

[233] With the onset of the economic crisis in 1997 and Shencourt encountering problems with its main contractor, Shencourt asked for a cancellation of Tranche C of the RM15 million. The project stalled.

[234] In 1999, however, Shencourt and the banks entered into a restructuring agreement, ie, a supplemental facility agreement dated 7 December 1999. This has been described in the appeal, and in the court below, as the first restructuring of 1999. Under this restructuring, the RM15 million facility for Tranche C was reinstated, Shencourt was given an indulgence of time for repayment, and an additional facility of RM17 million was granted. Under the first restructuring, the interest payments due were capitalised and the schedule of repayments was readjusted, in effect allowing the first payment to commence from the 24th month from the date of first drawdown of the restructured facilities and the reinstated facilities. Shencourt was also given the option to repay the restructured facilities and the reinstated facilities by way of progressive redemptions of parcels in the complex. Clause 12 of the supplemental facility agreement of 7 December 1999 is particularly relevant in this regard (as will be seen below) and to this extent deserves to be quoted at the outset.

[235] This is what cl. 12 says:

> **12. Repayment/Prepayment**
>
> 12.1. The Restructured Facilities and the Reinstated Facilities shall be repaid by thirty-five (35) equal monthly instalments of Ringgit Malaysia One Million Two Hundred and Forty Thousand (RM1,240,000.00) and a final instalment of Ringgit Malaysia One Million Two Hundred Sixteen Thousand One Hundred Fifty-Nine and Cent Ninety-Nine (RM1,216,159.99) only commencing from the Twenty Fourth (24th) month from the date of 1st drawdown of the Reinstated Facilities herein. The Borrower shall have the option of an alternative mode of repayment in the form of progressive redemption as exemplified hereinbelow under Clause 2.2 in the direct order of maturity.
>
> 12.2. As provided under Clause 12.1 hereinbefore, the Borrower may repay the Restructured Facilities and the Reinstated Facilities by progressive redemption of the parcels contained in the Building (excluding the Excluded Parcels) in the following manner … [The clause provides the formula in detail.]

[236] This particular agreement also provides in cl. 12.6 under the heading "repayment of interest first" that "[no] part of any payment by the borrower to the agent and the lenders shall be treated as repayment of principal and to all interest, default interest calculated as herein provided and due or deemed to be due and accrued shall have been paid."

[237] On the evidence, even before the supplemental facility agreement and the additional facility agreement dated 7 December 1999 was signed, Shencourt had pledged RM2 million fixed deposit receipts in favour of Alliance (then Bolton Finance Berhad), since Alliance had indicated to Shencourt and Lee that Alliance would participate in the proposed restructuring of the facilities only on condition that the RM2 million fixed deposit was placed with it by Shencourt. Aseambankers as security agent and the other syndicated lenders have disclaimed that they had any prior knowledge of the separate transaction between Shencourt and Alliance. (As will be seen below, this was a matter of some dispute between the parties).

[238] The sum of RM7,734,420.04 was in fact disbursed after the first restructuring as at July 2000, by which time the total drawndown had reached RM57,227,580.64.

[239] On or about 3 July 2000, Shencourt requested for further drawdown of RM359,096.33, but this drawdown request was rejected on the ground that Shencourt failed to satisfy the conditions precedent to drawdown. It was alleged by the appellants that Shencourt had not serviced the arrears in interest payments and had failed to maintain the required level of monies in the debt service reserve account ("DSRA"). On the appellants' evidence, the balance due (the arrears in interest) as at 30 June 2000 was RM400,091.81. As for the DSRA, Shencourt was contractually required to maintain the equivalent of six months' interest payments in this special account to service the facility.

[240] At this time, the appellants requested that Shencourt provide a feasibility report of the project. There were two feasibility reports prepared.

[241] There were further negotiations between the parties thereafter, with Shencourt asking for another restructuring. In the process, Shencourt indicated that it had a "white knight" which would come to its financial rescue and asked for a redemption statement, whilst asking for a "haircut" of 30% on the amount outstanding. The lenders replied they were only willing to agree to a 13.9% discount, which in turn was not agreed by Shencourt.

[242] The evidence indicate there was ultimately no "white knight" which materialised, although Shencourt managed to secure a lending facility from MAA.

[243] Originally it was intended that MAA be the party to redeem the loan from the lenders, but Bank Negara Malaysia did not allow such arrangement but instead only allowed MAA to come in as a co-lender which could then take a proportionate share of the securities. Bank Negara Malaysia did not allow MAA to refinance the entire facility, hence the restructuring with MAA as a co-lender merely.

[244] MAA then granted Shencourt a RM35 million loan, but RM8.5 million out of this amount was utilised as payment to the appellants. The appellants agreed at the same time to share their security with MAA on a *pari passu* basis. This was the second restructuring where the appellants agreed to waive interest

payment and granted a one year moratorium on repayments of interest from 30 January 2003 to 30 January 2004. The moratorium for repayments of principal was extended to 2007. The parties executed a supplementary facility agreement dated 30 January 2003. By this second restructuring, Shencourt had the benefit of a deferment of interest payment of a year and a deferment of principal payment of four years.

[245] The evidence also disclosed that subsequently in 2004 the appellants and MAA granted a new loan which took the form of "an advance payment" of RM2,476,728 to be utilised to settle various statutory payments necessary for Shencourt to obtain the certificate of fitness for Phase 1 of the project. Only Phase 1 was then completed; Phase 2 was abandoned. In the same year (2004), the appellants granted another moratorium on interest payments, extending it to 30 January 2005.

[246] The Phase 1 project was completed in 2005 with the CF obtained. Shencourt applied again for another moratorium on interest payments, asking that it be extended to 30 January 2006, for which there was no decision made since Shencourt filed the first suit against the appellants. The appellants retaliated by terminating the facilities and sued in the recovery action which was commenced in 2006 (the recovery suit).

[247] These were the relevant summary facts on which the parties were locked in dispute. As will be elaborated below, Shencourt and Lee as respondents in this appeal, claim the lending banks and the security agent were in breach of their duty of good faith and fair dealing, had acted *mala fide*, and indeed engineered the alleged default and brought a false claim to court. The lending banks, on the other hand, stressed that they had acted prudently as bankers and indeed could have walked away from the project and recalled the loan in 2000, but they stayed on to assist Shencourt and pumped in more funds to assist it through the restructurings and the moratorium on interest and principal payments.

The Substance Of The Suits And Overview Of The Pleadings

[248] The substance of the suit against the banks rests on a breach of duty of good faith and honesty in tort and breaches of contract which "in totality constituted a breach of legitimate contractual expectation" (as argued by Shencourt). This premise can be partly seen in the pleaded case of Shencourt as plaintiff in

Suit 665. At the heart of the matter, to adopt the analysis of the learned trial judge below in her detailed judgment, "lies the issue of breach of contractual, tortious and professional duties" by the banks.

[249] By way of preliminary analysis, it will be appropriate to state some of the salient paragraphs in the pleadings for a better understanding of the factual and legal matrixes in this appeal. To start with Suit 665, Aseambankers is sued "as the agent to the loan syndication" and in that capacity "had threatened the plaintiff with legal action if the plaintiff is unable to commence the repayment and/or servicing of the interest [on the loan] ... even though the defendant is fully aware that the plaintiff's present predicament is directly caused by the defendant's breach of duties in granting and administering the drawdown of the loan facility" (para. 51 of the statement of claim). In para. 52, the following material averments are found:

> 52. The Plaintiff contend that the Defendant was under a duty to act in good faith and honesty in granting and to administer the drawdown of the loan facility to the Plaintiff for the sole purpose of the completion of the construction of the revised project. At all material times, the Defendant had breached its duty and legal obligations to the Plaintiff:
>
> Particulars Of Breach
>
> a) failure to allow drawdown and make available the loan facility even though the Plaintiff had complied with conditions precedent of the Supplemental Facility Agreement;
>
> b) failure to allow drawdown of the facility even though the Plaintiff had complied with the Defendant's request to appoint a consultant to prepare a feasibility report on the viability on the revised project, wherein the consultant recommended in the best interest of the parties the revised project ought to be completed;
>
> c) failure to promptly issue a redemption statement at RM38,500,000.00 even though the Defendant was fully aware of the following:
>
> (i) that the Plaintiff had secured fresh financing for the revised project from a White Knight; and

(ii) the Plaintiff had secured the letter of waiver from majority of its purchasers for the revised project to limit the total liquidated damages for late delivery of the individual properties in the revised project to RM10,000,000.00;

d) failure to approve and disburse advance payments for statutory compliance to the Plaintiff, including but not limited to the bank guarantee to JPP, even though the Defendant was fully aware that these statutory payments were required to obtain the certificate of fitness for the Phase 1;

e) failure to assist the Plaintiff to commence the operations of the Phase 1 even though the Defendant was fully aware that the proceeds of rental of the Phase 1 was required by the Plaintiff to repay the loan facility granted by the Defendant, Co-Lenders and MAA; and

f) failure to grant the Plaintiff an extension of the moratorium period to 30/1/2006, when the Defendant was fully aware that the delay of the commencement of the operations of Phase 1 was directly caused by the Defendant's own failure to disburse advance payments promptly to the relevant authorities.

53. In consequence of the aforesaid breaches by the Defendant, as agent to the loan syndication, the Plaintiff had suffered the losses and damages which shall be referred to and quantified at the trial.

54. By reason of the matters aforesaid, the Defendant is liable to the Plaintiff for loss and damage arising from the breach of duty and obligations owed by the Defendant to the Plaintiff to act in good faith in granting and allowing drawdown of the loan facility for the benefit of the Defendant.

[250] Similar averments are repeated in the statement of defence and counter claim in Suit 443, although here the alleged breach of duty is levied against all the banks in the action. Hence in para. 30 of the statement of defence and counter claim, Shencourt pleaded "the first defendant contend that the plaintiffs were under a duty to act in good faith and honesty in granting and to administer the drawdown of the first credit facilities, for the facilities an advance payment to the first defendant for the sole purpose of the completion of construction of Phase 1 of the project. At all material times, the plaintiffs had breached its duty and legal obligations to the first defendant." Relying on the

plaintiffs breaches "either in tort, contract or as a banker", Shencourt and Lee then allege the banks have therefore repudiated the facilities agreement and/or guarantees, and following Shencourt's and Lee's rescission of the agreements and guarantees they are "accordingly discharged from being bound by the terms and obligations of the facilities agreement and/or guarantees respectively." See para. 34 of the statement of defence and counter claim. In the counter claim, both defendants prayed for declarations and orders to the effect that the relevant agreements have been duly rescinded and therefore the defendants are not liable to pay the banks the "sum of RM40,208,135.06 as at 28 February 2006 together with interest thereon", the relevant letters of guarantee are cancelled, the relevant securities documents are likewise to be cancelled and "the plaintiffs shall do all acts and things necessary to return the securities pledged by the first defendant, free from encumbrances."

The High Court Judgment

[251] The High Court, after a lengthy trial of some 23 days, gave judgment in favour of Shencourt and Lee, while dismissing the recovery action by the banks. It is necessary to examine in some detail the actual orders made. In regard to Suit 665, judgment was entered against Aseambankers which was ordered to (a) pay Shencourt special damages of RM115,500,000 together with interest at 6% per annum from the date of issue to date of satisfaction, and (b) pay Shencourt general damages to be assessed by the Senior Assistant Registrar including but not limited to the following:

(i) Loss of profits for Phase 1 (shopping podium);

(ii) Loss of profits for Phase 2 of the project (service apartments and boutique hotel);

(iii) Losses suffered by Shencourt and Lee arising from the sale of immovable and movable property in connection with the raising of funds to finance the project;

(iv) Losses suffered arising from rising construction costs in completing the project caused by the failure of Aseambankers to allow drawdown of the Facility; and

(v) Losses suffered from additional charges imposed by the authorities and for supply of utilities, with interest on the assessed damages at 6% per annum from the date of judgment till date of satisfaction.

[252] As for Suit 443, ie, the recovery action, the claim by the co-lenders/plaintiffs (Aseambankers, Affin, MBB and Alliance) was dismissed with costs, but the counter claim of Shencourt and Lee was allowed substantially in the terms pleaded.

[253] First, the following agreements were declared discharged:

(i) Facility agreement dated 27 June 1996 between Shencourt and the plaintiffs;

(ii) Supplemental facility agreement dated 7 December 1999 between Shencourt and the plaintiffs;

(iii) Additional facility agreement dated 7 December 1999 between Shencourt and the plaintiffs; and

(iv) Second supplemental agreement dated 30 January 2003 between Shencourt and Aseambankers as agent and the plaintiffs as lenders.

[254] Secondly, the court ordered that Shencourt was not liable to pay to Aseambankers, Affin, MBB and Alliance the sum of RM40,208,135.06 as at 28 February 2006 together with interest thereon.

[255] Thirdly, the letters of guarantee executed by Lee dated 27 June 1999, 7 December 1999 and 30 January 2003 were declared terminated arising from the discharge of the several facilities agreements referred to earlier.

[256] Fourthly, Lee was held not liable to pay to Aseambankers, Affin, MBB and Alliance the sum of RM40,208,135.06 as at 28 February 2006 with interest thereon.

[257] Fifthly, Aseambankers, Affin, MBB and Alliance were ordered to return to Shencourt the following security documents:

(i) Deed of assignment dated 19 August 1996 executed between Shencourt and Aseambankers;

(ii) Debenture dated 19 August 1996 between Shencourt and Aseambankers;

(iii) Deed of assignment (rental proceeds) between Shencourt and Aseambankers;

(iv) Deed of assignment (proceeds of sales) dated 27 June 1999 executed between Shencourt and Aseambankers;

(v) Second debenture dated 7 December 1999 between Shencourt and Aseambankers;

(vi) Supplemental debenture dated 7 December 1999 between Shencourt and Aseambankers;

(vii) Third debenture dated 30 January 2003 between Shencourt and Aseambankers;

(viii) Joint and several guarantee and indemnity dated 27 January 1999 as stated between Aseambankers, Lee and two other guarantors;

(ix) Joint and several guarantee and indemnity (pursuant to the additional facility agreement) dated 7 December 1999 executed between Aseambankers, Lee and two other guarantors;

(x) Third joint and several guarantee and indemnity dated 30 January 2003 as stated between Aseambankers, Lee and two other guarantors;

which security documents in both actions shall be released immediately and the plaintiffs are to take all action necessary to return all securities, charged by Shencourt, to Shencourt free from all encumbrances.

[258] Sixthly, Alliance shall pay the sum of RM2,000,000 to Lee, being a return of the fixed deposit charged under the facilities agreement.

[259] Lastly, Aseambankers, Affin, MBB and Alliance were ordered to pay costs to Shencourt and Lee.

[260] It is necessary to appreciate that the sum constituting damages of RM115,500,000 is calculated on the basis of liquidated and ascertained damages (LAD) payable by Shencourt to its purchasers (RM85 million) for late delivery of the units purchased, and the MAA loan incurred by Shencourt (RM30.5 million). Together with the RM2 million ordered to be returned to Lee, ie, the fixed deposit sum which was uplifted, the total sum of

RM117,500,000 was effectively the special damages awarded to Shencourt and Lee. Not only that, the High Court order also allowed general damages to be assessed on the basis earlier referred to in this judgment, and all securities taken by the banks in relation to the financing facility, together with all charges created by Shencourt, are released free from all encumbrances. The guarantors are also released from any liability whatsoever. The co-lenders, although advancing the facility which remains unpaid in the sum of RM40,208,135.06 as at 28 February 2006, are denied the right to claim the sum against Shencourt and/or the guarantors.

Basic Positions Of The Parties On The Outcome Of The High Court Judgment

[261] Counsel for the plaintiffs, Ms SM Yoong, describes this outcome as Shencourt and Lee being allowed effectively "to walk off with a project without any debt." The land on which the shopping podium stands becomes unencumbered, and on top of that, the Borrower (Shencourt) does not have to pay the LAD to the purchasers of the units in the project. The bankers have now to bear the LAD, such that the complaints of Shencourt's purchasers are now supposed to be paid by the bankers. Ms SM Yoong has made it a point to stress such an outcome will create a dangerous precedent to the banking industry and will dissuade banks from lending and restructuring loans of such magnitude to finance construction projects.

[262] Counsel for Shencourt and Lee in the appeal, Mr Tan Keng Teck, in supporting the High Court's findings and conclusions, has argued on the basic premise that the banks as co-lenders have instituted what he describes as "a false case". That material part of the written submission of the respondents reads:

> Exhibit P28 (an Internal Memorandum which was a pivotal factor in the High Court's judgment and which will be addressed shortly in this judgment) cuts across the pleaded defence. It is therefore submitted that the Appellants deliberately put forward a false case that further drawdown of funds was refused because the 1st Respondent was in arrears of interest when the proof rested on a policy decision which had nothing whatsoever to do with the contract between the parties.

Therefore, it is submitted with respect that the learned trial judge cannot be faulted in making findings against a party who presents a false case and in directing strong criticisms against the party concerned. This is precisely what happened in this case.

The Grounds Of The High Court Judgment

[263] Turning now to the grounds in support of the findings and conclusions of the trial judge, the point has been made that the learned trial judge had, in a long and meticulous judgment, analysed in detail the testimony of the witnesses and the governing law, with particular reference to the area of lender's liability. In the concluding part of the judgment, the learned trial judge summarised as follows:

> Based on the unchallenged oral testimonies adduced from both PW1 and PW3, at all material times, it was the Plaintiff's objective in wanting to complete the shopping podium for the benefit of all the stakeholders (especially the end purchasers) of the Project including the Defendant and the Co-Lenders themselves.
>
> The fact that the Plaintiff is a *bona fide* developer was confirmed by the Defendant's own witness Encik Rozidin bin Masari (DW1). DW1 in clear terms, said that the Lenders had faith in the Plaintiff as a Borrower and trusted that it could complete the project and that the said Project was viable and profitable.
>
> Given the above testimonial, the Defendant and Co-Lenders unlawfully denied the Plaintiff the funds which are so critical in completing the project on schedule. It was incredulous. This unlawful denial had a domino effect of causing an inevitable chain reaction which affected the viability of the Project drastically, including the Plaintiff's ability to repay the facilities.
>
> In view of its breach in contractual, tortious and fiduciary obligations under a financial arrangement, the Defendant and Co-Lenders are therefore obliged to pay damages to the Plaintiff.
>
> A slew of authorities support this position …
>
> I also find that in the event of a bank breaches its obligation (as did the Defendant and Co-Lenders in the instant case) under a Facilities Agreement, the bank is not entitled to profit from its wrongdoing. In fact in this case, my view is that due to this, the security which was placed by the Plaintiff should be released forthwith and discharged. ("See *Abdul Rahim Abdul Hamid v. Perdana Merchant Bankers Berhad* [2006] 3 CLJ 1 ...)

> I agree with the submission of counsel for the Plaintiff that as a result of the Defendant's and Co-Lenders' breaches in contract, tort and as a banker to the Plaintiff, they are disentitled to recover any part of the loans which were granted by them to the Plaintiff (and that all securities placed by the Plaintiff to them shall be forthwith released and discharged). (Pages 125-126 of the Judgment, Vol 2/44, Appeal Record)

[264] A little earlier in the judgment, the learned trial judge concluded:

> The Plaintiff had placed trust and confidence in the Defendant and Co-Lenders. They had assumed responsibility for providing the borrower with investment and financial advice. For reasons best known to themselves and for apparent ulterior motives the Defendant and Co-Lenders did not hold up their end of the bargain. They had breached their duties owed to the Plaintiff in contract, and tort and as a banker.
>
> It is my finding therefore that the Defendants and Co-Lenders had deliberately and maliciously engineered a default of the facilities by the Plaintiff, by creating a purported default on interest payments due under the Facilities and they had created the purported default on the interest payments and had deliberately withheld critical funds which were to be utilised by the Plaintiff to complete the construction of the Project together with a Certificate of Fitness for Occupation.
>
> It was solely due to the Defendant's and Co-Lenders' deliberate and malicious mismanagement of the facilities that had caused the Plaintiff's dire financial position.
>
> Furthermore the unlawful acts by the Defendant and Co-Lenders is a breach of the Plaintiff's legitimate contractual expectation that the facilities would be administered and managed by the Defendant and Co-Lenders in a proper and *bona fide* manner and that the Facilities would be promptly drawndown to be used to complete Phase 1 on the revised Phase 2 of the Project. (Pages 121-122 of the Judgment)

Finding of Deliberate and Malicious Engineering of Default and Breach of Duty of Good Faith and Fair Dealing

[265] As can be seen from the above passages, the High Court came to a finding that there was a deliberate and malicious engineering of a default of the facilities by the bankers. The

plaintiff's "dire financial position" was caused by this purported unlawful act leading to a breach of the banks' contractual, tortious and bankers' duties. The High Court also held that there was a deliberate and malicious mismanagement of the facilities and the unlawful acts constituted a breach of the plaintiff's legitimate contractual expectation that the facilities would be administered and managed in a proper and *bona fide* manner and that the facilities would be promptly drawndown to be used to complete Phase 1 and the revised Phase 2 of the project. In short, the High Court premised the judgment on a breach, *inter alia*, of the contractual and tortious duty of good faith and fair dealing/honesty which the High Court held to be measured by the objective standard of "decency, fairness or reasonableness in performance" – what the High Court described as "good faith performance".The High Court also found "special or fiduciary responsibilities" existed such that the Court was prepared to imply a term of good faith performance. As for "good faith performance", in the sense accepted by the High Court, the learned judge noted that the concept "is especially found in the American common law, codified in its Uniform Commercial Code (UCC)." Reference was made to several American cases, namely *Kirke La Shelle Company v. Paul Armstrong Company* (1933) 263 NY 79, *KMC Company v. Irving Trust Company* 757 F 2nd 752, and *State National Bank of El Paso v. Farah Manufacturing Co* L678 SW 3d 661 Tex Civ App 1984.

[266] See the following passage in the judgment for the High Court's broad statement of the law in the area of lender liability:

> Thus tortious liability for breach of duty of good faith and fair dealing has been utilised in the field of Lender liability. It follows therefore that parties to a contract are subject to an implied duty to all that is reasonably necessary to secure performance of the contract. "Neither party may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit". (Per Dixon J, in *Sheppard v. Fett and Textiles of Australia Ltd* [1931] 45 CLR 359. Even if it is argued that it is not necessary to imply a term relating to good faith performance into a loan contract in order to give it business efficacy, our case laws indicate that courts are prepared to imply a term relating to good faith performance if the lender assumes special or fiduciary responsibilities, as in the instant case.

> The Plaintiff had placed trust and confidence in the Defendant and Co-Lenders. They had assumed responsibility for providing the borrower with investment and financial advice. For reasons best known to themselves and for apparent ulterior motives the Defendant and Co-Lenders did not hold up to their end of the bargain. They had breached their duties owed to the Plaintiff in contract, and tort and as a Banker. (Pages 121-122 of the Judgment)

[267] See also another part of the judgment which addresses all the defendants more clearly:

> Thus on the facts, I am satisfied that the Defendants were in a fiduciary relationship with the Plaintiff and had not only not shown a heightened standard of care, it had in fact manifested bad faith and unfairness in the exercise of their duties as lenders towards the Plaintiff. (Page 88 of Judgment)

[268] In addressing the evidence, the learned trial judge concluded:

> From the evidence adduced, it is therefore my finding that the Defendant and Co-Lenders had breached their obligations. To reiterate the particulars of breach are as follows:
>
> a) Failure to allow drawdown and make available the Loan Facility even though the Plaintiff had complied with conditions precedent of the Supplemental Facility Agreement;
>
> b) Failure to allow drawdown of the Facility even though the Plaintiff had complied with the Defendant's request to appoint a Consultant to prepare a Feasibility Report on the viability of the Revised Project, wherein the Consultant had recommended in the best interest of the parties the Revised Project ought to be completed;
>
> c) Failure to promptly issue a redemption statement at RM38,500,000.00 eventhough the Defendant was fully aware of the following:
>
> (i) that the Plaintiff had secured fresh financing for the Revised Project from a white knight; and
>
> (ii) the Plaintiff had secured a letter of waiver from majority of its purchasers for the Revised Project to limit the total liquidated damages for late delivery of the individual properties in the Revised Project to RM10,000,000.00.

d) Failure to approve and disburse Advance Payments for statutory compliance to the Plaintiff, including but not limited to the Bank Guarantee to JPP, even though the Defendant was fully aware that the statutory payments were required to obtain the requisite Certificate of Fitness for the Phase 1;

e) Failure to assist the Plaintiff to commence the operations of Phase 1 even though the Defendant was fully aware that the proceeds of rental of the Phase 1 was required by the Plaintiff to repay the Loan Facility granted by the Defendant, Co-Lenders and MAA; and

f) Failure to grant the Plaintiff an extension of the Moratorium Period to 30.1.2006, when the Defendant was fully aware that the delay of the commencement of the operations of Phase 1 was directly caused by the Defendant's own failure to disburse Advance Payments promptly to the relevant authorities. (Pages 123 - 124 of the Judgment)

The Submissions Of The Parties

Concession by the Respondents on Breach of Fiduciary Duty

[269] It is best to state at the outset a major concession made by counsel for the respondents in the course of his submission after this court had heard appellant's counsel's submission. Counsel for the respondents expressly conceded that the issue of fiduciary relationship was not raised in the respondents' pleadings, or in the submissions before the High Court. The respondents' case is said to be based purely on breach of contract. In response to this concession, counsel for the appellants argued that upon a perusal of the grounds of judgment of the High Court, the judge's findings on liability was wholly predicated on a finding that the appellants were in a fiduciary relationship with Shencourt. We were urged by counsel to overturn the entire judgment of the High Court and to allow the appeal on this ground alone.

[270] On the law, a decision based on pleaded case will as a rule occasion a failure of natural justice and will be liable to be set aside on appeal for the reason that it can deny the affected litigant, such as the appellant here, the right to present its case fully before the judge on the unpleaded issue before the decision is made by the court. It is also said that it is not the duty of the

court to make a case for a party when that party does not raise, or wish to raise, a point in the litigation. See *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196:

> A judgment should be based upon the issues which arise in this suit. If any such judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure.

[271] To be fair to the judgment of the learned High Court Judge, the effect of this concession by counsel for the respondents should be judged against the totality of the judgment, and as such a decision in relation to this concession will be addressed after considering the totality of the circumstances in the light of the detailed submissions of the parties on all relevant points, although the fact that the judgment has been rendered partly on a pleaded case renders it somewhat weaker.

Respondents' Submissions

[272] Starting first with the respondents' submissions, counsel attempts to persuade us not to disturb the findings and conclusions of the learned trial judge since her findings are based on the evidence and the credibility of witnesses. According to the respondents, the sole ground relied by the appellants rested on the claim that Shencourt was in default for failure to service overdue interest. That was the reason why further drawdown was refused in July 2000 under the supplemental facility agreement of 7 December 1999. The learned trial judge found this reason to be untrue on the evidence. The single most important piece of evidence which led to this conclusion is exh. P28, namely an internal memorandum of Aseambankers dated 23 May 2002. This document reads:

> The Lenders are not willing to grant additional loans to Shencourt to complete the Ampang Galaxy Project. On Aseambankers' part, we are already over exposed to the Broad Property Sector and does not have the capacity to further lend to the property sector.

[273] This is the document which is described in the High Court judgment as more "infernal" than "internal". Counsel for the respondents refers to the following passage in the judgment:

> … in the course of the trial, the Defendant was at pains to downplay the significance of the Internal Memorandum. It was more infernal given the implication.
>
> One of the signatories of the said Internal Memorandum, one En Ahmad Saifuddin Morat was subpoenaed but evaded service several times and came to court only after he was on the brink of being held for contempt of court.
>
> His testimony concerning the said Internal Memorandum was evasive at best, and downright unreliable at worst. In any case, the Internal Memorandum prepared by the officers of the Defendant clearly stated that the Defendant and Co-Lenders were unwilling to provide any further financing to the Plaintiff for the construction and completion of Phase 1 of the Revised Project, as the Defendant and Co-Lenders were over exposed in their overall lending to the property sector.
>
> Nothing could be more stark than this, in the revelation of the Defendants and Co-Lenders' position *vis-a-vis* the Plaintiff and the loan facility. The cross examination of the relevant witnesses bear this out. Clearly, the extent of the Defendant's and Co-Lenders' malice went past any fear of being held in contempt.
>
> In view of the above, I find that the Defendant had ultimately motives in not providing financing to the Plaintiff which now puts the jigsaw of missing parts of the Defendant's incomprehensible conduct, into place. The Defendant had unreasonably refused to allow the Plaintiff to drawdown the loan facility. The Defendant's and Co-Lenders' acted maliciously in depriving the Plaintiff of the said facility and this put paid to the Plaintiff's construction and completion of the Revised Project, escalating the Plaintiff's loss and damages suffered, and the non completion of the same.
>
> As can now be seen, the Defendant and Co-Lenders had no intention of providing any financing to the Revised Project since clearly their rationale for refusing to provide financing was predicated on the non-payment of interest and principal which was untrue. (Pages 113 - 114 of Judgment)

[274] Counsel for the respondents describes exh. P28 as a factor which "cuts across the pleaded defence". As summarised in the written submission for the respondents, the appellants, it is argued, deliberately put forward a false case that further drawdown of

funds was refused because Shencourt was in arrears of interest "when the truth rested on a policy decision which had nothing whatsoever to do with the contract between the parties." In short, the appellants did not allow further lending because they were over-exposed to the property sector and not because Shencourt was in default of interest payments.

[275] Further, the appellants had purposely and maliciously engineered a default by misapplying the monies received from redemption payments by paying the principal sum instead of paying the interest sums that were due. Responding to the claim that even if these payments had been used to settle interest there would still have been a shortfall, it is argued that the learned trial judge had found that the purported shortfall could have been settled by utilising the funds available in the debt service reserve account (DSRA) and by applying a set-off against the fixed deposit of RM2,000,000 placed with Alliance Bank.

[276] Mention is made as well of the appellants' unethical conduct. This aspect of the submissions is better highlighted by quoting the exact words employed by counsel in the written submission:

> To achieve the unlawful objective, the Appellants maliciously mismanaged the facilities by engineering a default of interest payments. Upon forcing the 1st Respondent into a tight financial corner, the Appellants would then demand to enter into an unethical banking arrangement to share the profits of the Project. This unethical demand to profit share the Project was confirmed in the 1st Appellant's letter dated 7.11.2000 ... which reads as follows:
>
> > It was also suggested that the scheme could be developed, whereby the Lenders could participate in profit-sharing of the sales revenue.
>
> It is now apparent that the Appellants were motivated to force the 1st Respondent to relinquish the project in order to take an unethical profit from the project and at the same time to conceal the Appellant's own financial inability.

[277] Prominent in the submission is the respondents' reliance on the Federal Court decision in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1, which is cited to support the conclusion that the trial court was right to

order the release and discharge of the securities. This case authority is advanced to establish the legal proposition that the bank has a duty to observe reasonable skill and care, and if a breach of such duty results in financial damage to the customer, the bank cannot be allowed to profit from its own wrong, and as such the borrower can be released from his obligation to repay the loan and to have the securities granted in the bank's favour cancelled. The following passages in the judgment of the Federal Court become relevant:

> To our minds, if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders (see *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363) ...
>
> ... we hold that it was as a consequence of the aforesaid breaches of the Respondents, that the Fifth Appellant suffered financial problems. *Hence, the appointment of the receiver and manager on the assets of the Fifth Appellant was caused entirely by the wrong doings of the Respondent themselves. They cannot profit from their own wrongs. The appointment of the receiver and manager was injudicious and should be set aside* ...
>
> ... Appeal is allowed with costs here and below. Claims of the 5th Appellant are allowed as follows:
>
> (a) that the remittance of the said loan by telegraph transfer in one drawdown was in breach of the condition precedent of the working draft/drawing notice agreed between the 5th Appellant and the said 1st Respondent and/or was made negligently on the part of the 1st Respondent;
>
> (b) the 5th Appellant is not liable to pay to the 1st Respondent and the Lenders the said loan and any interest and charges thereon;
>
> (c) the delivery up forthwith by the 1st Respondent to the 5th Appellant of all the security documents for cancellation with consequential directions;

(d) **an order for refund forthwith of all monies due** by the 1st Respondent to the 5th Appellant relating to the cash fixed deposit of RM6.6m with interest thereon at 8% pa from the date of deposit on 10th July 1992 to date of refund to M/s Gulam & Wong as solicitors for 5th Appellant;

(e) appointment of the 7th Respondent as Receiver and Manager is invalid or otherwise null and void;

(f) an order for a true account and inventory verified by statutory declaration by the 7th Respondent of the funds and all other assets and undertakings of the 5th Appellant received, taken or utilized by the 7th Respondent in the exercise of his powers as Receiver and Manager, and for refund/redelivery forthwith to the 5th Appellant of all such funds and assets and undertakings with interest at 8% pa;

(g) an order for damages against the 1stand 7th Respondents to be assessed and paid to the 5th Appellant.

(emphasis added)

[278] Counsel for the respondents has also drawn to this court's attention the following cases to support the position that where a bank breaches its obligations under a loan agreement, it becomes liable:

(a) *Perwira Habib Bank (M) Bhd v. Hong Huat Holdings Sdn Bhd & Ors* [1991] 2 CLJ 906; [1991] 1 CLJ (Rep) 373;

(b) *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1; [1999] 1 MLJ 193;

(c) *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781; [2004] 1 MLJ 657.

[279] An additional ground advanced by the respondents relates to an alleged "legitimate contractual expectation" on their part to have the drawdowns released. *Prismanet (M) Sdn Bhd v. Perwira Affin Merchant Bank Berhad & 3 Ors* [1998] 1 LNS 48; (unreported) (1998) MLJU Lexis 1035 is referred to.

Appellants' Submissions

[280] The appellants adopt a three-pronged approach in this appeal. First, it is argued, as a major plank in the appeal, that the learned High Court Judge has decided the dispute on the basis of a non-existent cause of action in our law, namely breach of an alleged "duty of good faith". The High Court has basically relied on codified American law which recognises a tortious duty for breach of a duty of good faith based on that country's Uniform Commercial Code ("UCC"). Secondly, the High Court judge erred in deciding on a matter not pleaded when she decided on the basis of a breach of fiduciary duties allegedly owed by the appellants to Shencourt despite the relationship being that of banker-borrower. Thirdly, the appeal should be allowed since the High Court judge erred in arriving at wrong findings of fact due to insufficient judicial appreciation of the evidence adduced at trial. To summarise, it is submitted that the High Court judge has erred in applying wrong legal principles and in making wrong findings of fact on the evidence.

[281] As earlier observed in this judgment, the appellants forcefully argued that on the second ground alone (absence of pleaded case on breach of fiduciary duties) this appeal should be allowed. Each of these grounds will now be stated in turn.

Breach of Duty of Good Faith

[282] Much effort has been spent by counsel on this ground with a clear cut argument mounted on the premise that no such cause of action exists under our law, or the common law. Under s. 5 of our Civil Law Act 1956, it is English law that will apply on issues related to banks or banking unless other provision is made by any written law. Section 5(1) clearly provides, in relation to the States of West Malaysia, other than Malacca and Penang, as follows:

> 5. Application of English law in commercial matters
>
> (1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the **law of** partnerships, corporations, **banks and banking**, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be

> administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law. (emphasis added)

[283] Counsel also quotes *Chitty on Contracts* (29th edn.) to the following effect:

> The modern view is that, in keeping with the principles of freedom of contract and the binding force of contracts, in English contract law there is no principle of good faith of general application ...
>
> Given the remarkably open textured nature of good faith, this would lead to a very considerable degree of legal uncertainty and could be seen as trespassing too far into the legislative domain.

[284] We have also been referred to the Singapore Court of Appeal decision in *Ng Giap Hon v. Westcomb Securities Pte Ltd and Others* [2009] 3 SLR 518, for a very comprehensive and comparative analysis of the current position in Singapore law and common law. Quoting from the Court of Appeal of Singapore judgment, it is argued that "the doctrine of good faith is far from settled" and "the case law itself appears to be in a state of flux." See the learned judgment of the Singapore Court of Appeal delivered by Andrew Phang Boon Leong JA at p. 546 of the report. See also the observation of the Singapore Court of Appeal at para. 60, p. 550 of the report:

> ... it is not surprising that the doctrine of good faith continues ... to be a fledging one in the Commonwealth. Much clarification is required, even on a theoretical level. Needless to say, until the theoretical foundations as well as the structure of this doctrine to settle, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere ... In the context of the present appeal, this is, in our view, the strongest reason as to why we cannot accede to the Appellant's argument that this Court should endorse an implied duty of good faith in the Singapore context.

[285] Counsel further highlights the statements made by the House of Lords in *Walford v. Miles* [1992] 2 AC 128 as an authoritative source for the view that there is no cause of action of breach of good faith in English contract law. The House of Lords in *Walford* stated:

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his own interests, so long as he avoids making representations ... A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party ... How is the Court to police such an agreement?

[286] A useful commentary by William Blair QC, *Banks, Liability And Risks* (3rd edn.), which contains a discussion on the American position, has also been directed to our attention. The learned author of this commentary has opined that "there is a clear distinction between establishing an implied general duty of "good faith and fair dealing" and applying good faith and fair dealing only to determine if there is a breach of an expressly agreed performance duty" and "Good faith and fair dealing will not generally be used as the basis of a contract duty not expressly negotiated, but may be applied to determine if expressly agreed upon duties have been breached." In relation to borrower/lender relationships, the learned author refers to a decision of the United States District Court in *California, Standard Wire And Cable Company v. Ameritrust* 697 F Supp 368 (1988), and a decision of the Oklahoma Supreme Court, *Rogers v. Tecumseh Bank* 756 P 2d 1223 (Okla 1988), for the view that a banker-customer relationship does not constitute a "special relationship" to impose a tortious duty of good faith and fair dealing.

[287] Ms Yoong, counsel for the appellants, especially highlights the quoted passage in *Rogers v. Tecumseh Bank*, *supra*, to support the appellants' proposition that there will be practical problems and uncertainties if the court of law should impose a duty of good faith in lending transactions involving banks. A borrower/lender relationships is not a special relationship, according to counsel, as parties are not inherently in an unequal bargaining position and are not non-profit motivated. In *Rogers*, *supra*, it was held:

> Here we have arms-length negotiating, a relatively equal bargaining capacity and no snares and traps for the unwary, quite unlike the circumstances surrounding the instance of an insurance policy.
>
> Furthermore, the purpose of an insurance policy is the elimination of risk, an aspect wholly absent in the contract now before us ... The purpose of a commercial loan, on the other hand, is to provide the funds to facilitate the taking of a business risk.

> Where, as here, there is no special relationship, the parties should be free to contract for any lawful purpose and upon such terms as they believe to be in their mutual interests. To impose tort liability on a bank for every breach of contract would only serve to chill commercial transactions.

[288] The learned commentator of *Banks, Liability And Risks*, *supra*, further states:

> Applying the elements of a "special relationship" in *Standard Wire And Cable Company v Ameritrust*, it seems that the Borrower/Lender is not a "special relationship". The parties are not inherently in an unequal bargaining position, Lender/Borrower loans are not non-profit motivated, the Borrower is not necessarily vulnerable because of a position of trust, and the Lender does not normally have knowledge of the borrower's vulnerability.
>
> These elements will vary in particular Borrower/Lender relationships, but generally, in a profit-oriented economy, both the Borrower and Lender believe the borrower's use of loan proceeds will result in a profit that will pay the lenders interest return and generate excess return for the Borrower. Both Borrower and Lender are free to negotiate the most advantageous business agreement; but if they believe the business opportunity does not justify the risk can be structured more favourably with others, they are free to improve the proposed business deals or decline them or go to other opportunities. The Borrower/Lender relationship is not circumstanced where both are obligated to act for the economic benefit of the opposing party. Both Borrower and Lender are fully aware of both parties' desire to reduce the risks and generate profits. (At page 412 of the commentary)

[289] The larger point which seems to be advanced by counsel for the Appellants appears to be that even under American law the rules on a tortious breach of duty of good faith and fair dealing remain contentious and are not really of general application, and have to be given a more restrictive application, if at all, in borrower/lender relationships in commercial loans transaction.

Breach of Fiduciary Duties

[290] To recapitulate the point made earlier in this judgment, the respondents have conceded that this issue was not pleaded, and it is thus necessary to only state in brief the appellants' argument that on the law a banker-customer relationship in a lending

transaction is purely contractual and not fiduciary. *Murphy and Another v. HSBC (formerly known as the Midland Bank plc) and Another* [2004] EWHC 467 is cited in support:

> It is settled law that "on the fact of it a relationship between a banker and customer is not a fiduciary relationship" ... The basic banking transaction of lending is not fiduciary in nature and so in the ordinary course of events, a bank which lends to a customer does not owe the customer a fiduciary duty. The mere fact that the claimants trusted the Bank does not give rise to a fiduciary duty when, as in the present case, first the claimants had their own paid advisers, second the claimants had freely chosen to enter into contracts of loan and insurance with the Bank when they could have gone elsewhere to obtain the services and third, the Bank were not the paid or the unpaid advisers of the claimants but merely a Lender of money to them.

[291] See also the following cases cited by counsel in support of the same proposition:

(a) *Seven Seas Industries Sdn Bhd v. Philips Electronics Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217; [2008] 5 MLJ 157.

(b) *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff bin Shah Mohd & Ors and other appeals* [1997] 2 CLJ 607; [1996] 2 MLJ 265.

(c) *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188 (Federal Court).

(d) *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1 (Court of Appeal).

(e) *Kian Lup Construction v. HongKong Bank Malaysia Bhd* [2002] 7 CLJ 32.

(f) *Nusantara Network Sdn Bhd v. Malaysia Building Society Bhd* [2010] 1 LNS 152 (Civil Suit No: S6-22-705-2005; unreported)

[292] As for the local case authorities, and in view of the concession by the respondents, it suffices to reflect on the succinct statement of the law as analysed by Ramly Ali J (now JCA) in *Kian Lup Construction v. Hong Kong Bank Malaysia Bhd*, *supra*, where His Lordship adopts a tripartite categorisation of banker-customer relationship:

Generally, banking institution provides a number of basic financial and advisory services to customers, namely:

(1) Traditional banking facility where customers deposit the monies with the bank and the bank is liable to repay the money when demanded or instructed by the customer ...

(2) Financial and advisory services where the bank is appointed by the customer to be the customer's adviser on matters relating to financial and advisory services. Usually these services are in addition to the first additional services stated above.

(3) Financial facility where the bank provides loan or other financial facilities to customers such as overdraft facilities. In this category, the bank is a Lender and the customer is a Borrower. As for the third instance, i.e., where the bank provides a loan or financial facility to the customer, the relationship is also one of the Debtor and Creditor. In this case, the bank is a Creditor (Lender) and the customer is a Debtor (Borrower). From the above 3 scenarios, only the second instance involves a fiduciary relationship between the bank and the customer, while in the first and third instances, the relationship between them is merely contractual, i.e., only as debtor and creditor, not fiduciary." (at pages 51-52 of the report)

Challenge On Findings Of Fact On The Evidence

[293] The stand taken by the appellants in summary has been that the learned trial judge had made wrong findings of fact arising from an insufficient judicial appreciation of the evidence adduced. As argued by counsel, the trial judge had found that the appellants had deliberately and maliciously engineered a default when no evidence supported this finding, and instead had ignored the fact that the appellants had "time and time again granted indulgences and had continued to grant additional financing" to Shencourt. The lending banks could have walked away from the project even in 1999, but they continued to advance monies and granted indulgences to support Shencourt.

[294] The evidence, it is argued, show the appellants acting as prudent bankers who were not in breach of their contractual obligations. Aside from the payment of RM8.5 million through the MAA loan, Shencourt had not repaid the lenders since 2003.

[295] Shencourt was told that it was in arrears in repayment and in maintaining the required amount in the DRSA, and for these reasons the appellants could not permit the further drawdown of RM359,096.33 in July 2000. Further, it was in the circumstances reasonable for the lenders to require a feasibility report on the project before they could commit themselves to further lending. There was nothing sinister in the exercise, and it was within the lenders' right to assess the report and determine whether they could prudently allow further drawdown. The learned trial judge had extracted a fiduciary duty from this exercise and faulted the appellants for not granting the drawdown although the reports were favourable and indicated that the project was economically feasible. This finding is strongly disputed by the appellants.

[296] It is also the appellants' case that Shencourt had in fact admitted it failed to pay its arrears in interest and thus should be estopped from raising the allegation that the appellants had engineered a breach. Shencourt had admitted therefore that the conditions for drawdown were not met. Although submitted before the learned trial judge, this issue it is argued, was not addressed in the judgment of the High Court.

[297] It is the appellants' primary position that the banks were entitled contractually not to allow further drawdown under cl. 5.1 and Schedule 4 of the 1999 agreement:

Clause 5.1:

> The drawdown of the Reinstated Facilities or part thereof shall be upon finalization and/confirmation of the following:-
>
> 5.1.2 Compliance of all conditions precedent as stipulated in Schedule 4 herein ...
>
> 5.1.3 Compliance of all conditions precedent as stipulated in Schedule 5 herein in respect of the Reinstated Facilities.

Schedule 4

> 1. The Reinstated Facilities or part thereof will become available to the Borrower upon the fulfilment of the following conditions precedent:
>
> ... (d) the Agent and the Lenders are satisfied that no event has occurred so as to render the Indebtedness hereby secured immediately repayable and no Event of Default as herein provided shall have happened and be continuing.

[298] Failure to pay the indebtedness "after the same shall become due and payable" to the agent and the lenders "whether formally demanded or not" is by cl. 17.1.1, an "event of default." A

[299] As regards the appellants' failure to ensure that payments received as redemption sums be credited to interest owing and not however to the principal amount, the appellants emphasise the provisions in cls. 12.1, 12.2 and particularly cl. 12.4, which allow the redemptions to be credited to principal and not interest. Attention is drawn to cl. 12.4 which expressly provide that "progressive redemption shall be utilised for the full repayment of the restructured facilities and the reinstated facilities." As argued, to quote the relevant part of the appellants' written submission, "if redemption payments were utilised towards interest payments first, this would lead to a situation whereby all the security may have been redeemed but the principal loans remain outstanding." Such an outcome would, it is further argued, be unworkable in commercial practice. B C D

[300] "Restructured facilities" and "reinstated facilities" are defined in the 1999 agreement as related to principal payments, of which the appellants were to receive only 23% of the redemption payments, the remainder 77% to be received by Shencourt (cl. 12.2(i)) E

[301] As to the failure to utilise the amounts in the DSRA and the RM2,000,000 fixed deposit placed with Alliance, the appellants' response is that the DSRA is created contractually to ensure at least six months' interest payments are captured, and as for the fixed deposit sum, this was a special arrangement between Alliance (earlier, Bolton Finance) and Shencourt to secure the Alliance portion of the loan. Shencourt argues that the amount available in the DSRA as at 30 June 2000 was more than RM500,000 (the equivalent of one month's interest payment) and that would have been sufficient to settle the outstanding interest remaining after netting off the redemption payments. The DSRA is a form of security, and could only be uplifted with the agreement of all lenders. As a form of security to ensure a reserve of six months' interest payments, it would still require to be maintained at any one time unless expressly agreed to by the lenders. Further, the evidence indicates that Shencourt never F G H I

requested that the DSRA be utilised to settle the interest outstanding. As for the RM2 million fixed deposit, the evidence clearly indicates it was a security provided by Shencourt and Lee (Lee being the actual party providing it) as a separate arrangement between Shencourt and Bolton Finance (now Alliance) to persuade Alliance to agree to the restructuring in 1999. Indeed, it was subsequently uplifted on 30 November 2000 to settle interest payment due to Alliance by Shencourt. The letter from Bolton Finance dated 1 December 2000 addressed to Lee expressly stated:

> RE: FIXED DEPOSIT WITH BOLTON FINANCE BERHAD ("BFB")
>
> At your request, we had, on 30th November 2000, uplifted two (2) Fixed Deposit Certificates (Receipt No. 174252 and 174253) of RM100,000.00 each for the payment of interest due to BFB by Shencourt under the Syndicated Credit Facilities.

[302] All said and done, the fact remains, so contends counsel for the appellants, that subsequent to the request for drawdown in June 2000, there were further indulgences given and a further restructuring effected in 2003, and thereafter there were further sums advanced to assist Shencourt to fulfil its statutory payments to obtain the CF for Phase 1, and to provide the bank guarantee as required by Jabatan Perkhidmatan Pembentungan.

[303] In answer to another aspect of the respondents' argument that the appellants engineered a default and created a false case of a default in interest payments by Shencourt, and the reliance on the internal memorandum (exh. P28), the appellants' counsel has especially emphasised the divergence in the dates. The refusal for drawdown was made in July 2000 whereas the internal memorandum is dated two years later, ie, 23 May 2002. The appellants dispute the authenticity of this internal memorandum and question the trial judge's reliance on the evidence of the subpoenaed witness (PW4; Saifudin) in concluding that the document was authentic. Counsel refers to the evidence of not only PW4 but also that of DW1 (Rozidin) and DW3 (Saraswathy). According to DW3, there was no record of such document in Aseambankers' files. Further, the document was incompletely signed, without the signature of Rozidin. Even

Saifudin said the signature appearing on it looks different from his usual signature. The actual testimony of Saifudin is quoted in support:

Counsel: Were you given the opportunity to look at the document just now before being questioned?

PW4: No. Only during that time. I just saw it just now.

Counsel: See p. 970 bundle E. Have you seen the original of the document?

PW4: No. And my signature looks different.

Counsel: Is this the reason why you are not sure that it was you who prepared the document?

PW4: Yes. Firstly the signature looks different. Secondly En Rozidin did not sign. Thirdly memo like this would be to Credit Underwriting Committee and not to Board of Directors. And fourthly it was some time ago in 2002.

Court (Showed PW4 photocopy of the document) Shown to PW4.

PW4: This is the same document as ID28. On a 50-50 basis I cannot be sure of the authenticity of this document because:

(1) It is addressed to Board of Directors when our process is, it is normally addressed to Credit Underwriting Committee.

(2) My signature in the document is different from my signature in other documents-eg, p. 951.

(3) There is no seal of approval or rejection. There is no decision on this paper.

(4) All the signatories must sign. Here, one signatory En. Rozidin did not sign. So I cannot verify its authenticity.

[304] Addressing the "suspicious circumstances" surrounding the internal memorandum, counsel argues the learned trial judge had not properly considered these, in particular the fact that Lee himself had said "somebody had mistakenly put it in my file" when questioned as to how he came by this document.

[305] In any event, at its best, the internal memorandum merely referred to the alleged incapacity of Aseambankers (not the other lenders) to further lend to Shencourt since it was "already over-exposed to the broad property sector". Mention is made of the evidence by DW3 (Saraswathy being the most senior officer at that time) that Aseambankers was not in fact over-exposed to the broad property sector. To quote the relevant parts of the notes of evidence at p. 1155 of the appellant's core bundle (2):

> 6. Please refer to page 970, Bundle E, which has been marked as "Exhibit P-28". This is Aseambankers' purported Internal Memorandum dated 23.5.2002. Based on Clause 6.1 at page 974 of Bundle E, SSB alleges that Aseambankers has breached Bank Negara's guidelines not to exceed 20% of Aseambankers total outstanding loan base in relation to credit facilities to the broad property sector. Is this true?
>
> 6A: No, it is not. I have checked Aseambankers' records and exposure in relation to financing to the broad property sector as at April 2002 is in fact only 16.51%. The purported Internal Memorandum is thus wrong and I wish to emphasise that this Internal Memorandum was never approved and is not in any of Aseambankers records.
>
> 7: Was Aseambankers overexposed to the broad property sector in July 2000 when it refused to drawdown to SSB under the Restructured Facilities?
>
> 7A: No. Aseambankers' exposure to broad property sector as at June 2000 was 18.68%. Aseambankers was well able to disburse monies as requested by SSB but had refused drawdown as SSB was in default of interest payments and had failed to comply with requirements for the Debt Service Reserve Account ("DSRA").

[306] On the issue of the RM8.5 million being taken by the lenders from the RM35.5 million loan from MAA, and thus resulting in a shortfall in the financing of the project and its consequent jeopardy, the learned trial judge held that this was a last-minute imposition which caused the project to be jeopardised. The appellants denied this was a last-minute imposition, stressing that the purpose of the RM38.5 million loan was partly to redeem the indebtedness to the existing lenders to the tune of RM8.5 million. Section 5.02 ("purpose of the facility") in the facility

agreement dated 30 January 2003 between Shencourt and MAA expressly states:

> The proceeds of the Facility and of all Advances shall primarily be applied by the Borrower to fund and/or finance the following purposes:
>
> (a) the sum of up to Ringgit Eight Million Five Hundred Thousand (RM8,500,000) to repay part of the indebtedness of the Borrower due to the Syndicate Lenders under the Existing Syndicated Facilities; and
>
> (b) the sum of up to Ringgit Twenty Six Million Five Hundred Thousand (RM26,500,000), to finance the completion of the New Phase 1 of the Project ...

[307] It was also agreed that under this agreement any shortfall of working capital would be made good by Shencourt and its director, Lee Kam Yoong, as provided in s. 4.01 (cc):

> (cc) the Lender shall have received from the Borrower and its Director, Lee Kam Yoong ... undertakings in such form and substance acceptable to the Lender, agreeing to cover any shortfall arising in the working capital required for the completion of the New Phase 1.

[308] In summary, the appellants argue there was no evidence from which the learned judge could have plausibly concluded that the Lenders had maliciously engineered the default, or had breached their obligations by failing to extend the moratorium on the loan when requested, or that the delay in the completion of the project was caused by the appellants' failure to disburse the advance payments promptly. Counsel has drawn to our attention that as for the bank guarantee issued by MBB, for instance, it was issued within about just over two weeks from request.

[309] The appellants also allude to the learned judge's findings on their "ulterior motives" to "maliciously engineer" Shencourt's default, and the motive to convert the loan into a joint venture and a profit-sharing arrangement. Counsel argues thus:

> This was a non-issue. The only mention of any suggestion for profit sharing of the Project was made in passing in one of the many meetings between the Appellants and the 1st Respondent to resolve the default of the Facilities. DW1 and DW5, who were all present at the meeting, had testified that this was a suggestion which was never followed up at all.

[310] Counsel for the appellants has strongly argued that the judgment of the High Court must be overturned, for if it is left to stand it will affect the banking industry. It is best to extract counsel's written submission on this issue to appreciate the vigour in which the stand has been pursued:

> This judgment, if left to stand, will affect the banking industry as:
>
> (i) If a fiduciary duty "to act in good faith" is imposed on banks, then banks need to know:
>
> – What is the scope of duties of the bank?
>
> – What conduct would or would not amount to good faith?
>
> – What if the bank acts within its contractual rights but the Borrower alleges bad faith?
>
> (ii) The Court will be flooded with claims by borrowers alleging lack of good faith or breach of fiduciary duties;
>
> As the House of Lords said in *Walford v. Miles*, "How can the Court police such agreements?"
>
> (iii) We will be the only Commonwealth jurisdiction to find the existence of a "duty to act in good faith" as a cause of action. This was rejected in the UK and in Singapore and even in the US, as a "duty to act in good faith" is in a state of flux and is found only if there is a specific relationship;
>
> (iv) As for fiduciary duties, this would mean a bank must look after the borrower's interests. This cannot be, as for a loan in a commercial transaction, unlike e.g. a trust relationship, the Courts have always held no fiduciary duties arise in Banker/Borrower relationships; and
>
> (v) It is devastating to the banking industry if a Borrower can walk away without having to repay its loans.

This Court's Evaluations And Findings

[311] As evident from the submissions of the parties in this appeal, we have to consider this appeal on two broad grounds one pertains to whether the correct law was applied, and the other whether the findings and conclusions of learned trial judge can be supported on the evidence before her, judged on the basis of accepted principles of appellate intervention.

[312] We have previously adverted to one concession made by counsel for the respondents that his clients concede they did not plead any breach of a fiduciary duty on the part of the appellants, nor submitted on the issue in the court below. In the course of the submissions, counsel also informed the court that the respondents, whilst arguing that the ruling by the trial court on the damages should stand, nevertheless the loan that has been disbursed to Shencourt must be given credit at the stage of assessment of damages, and recoverable to the time of the breach. In the event after setting-off against the damages, there is any surplus remaining to the lenders, the securities will be released back to the appellants. By so conceding, it now appears that the decision of the learned trial judge will require a major re-assessment. After all, the trial judge had proceeded on the basis that the appellants could not take advantage of their own wrong and hence she awarded damages as she did, to include even an order discharging the securities.

[313] We have indicated earlier as well that the concession relating to the breach of fiduciary duty will require to be carefully considered against the totality of the judgment and the full circumstances of this appeal. The issue of fiduciary duty was viewed by the trial judge as connected with the requests for the feasibility studies, which in turn is related to the overall issue of failure to allow drawdown in July 2000. To re-emphasise the findings made by the trial judge in this connection, it was held that on the facts "the defendants were in a fiduciary relationship with the plaintiff and had not only not shown a heightened standard of care, it had in fact manifested bad faith and unfairness in the exercise of their duties as lenders towards the plaintiff". In finding there was a breach of the duty of good faith and fair dealing, the learned trial judge had expressly used this fiduciary relationship as a major ground as can be seen in the reference to "(b) failure to allow drawdown of the facility even though the plaintiff had complied with the defendant's request to appoint a consultant to prepare a feasibility report on the viability of the revised project, wherein the consultant recommended in the best interest of the parties the revised project ought to be completed." There are other grounds in the findings of the court, as indicated earlier in this judgment, and as such I am of the opinion that the concession by counsel for the respondents on the matter of

A fiduciary obligations not being pleaded, cannot be the sole ground to reverse the decision of the trial court. The sum effect has to be that those parts of the judgment that touch and concern the finding of a fiduciary obligation arising from the evidence on the provision of the feasibility reports cannot stand in law. The B submission by the appellants that deciding on an unpleaded issue gives rise to a patent failure of natural justice therefore has merit, but it cannot be that this appeal should be allowed on this ground alone.

C **[314]** We now turn to the major submission by the appellants that the trial court based its ultimate decision on the basis of a non-existent cause of action in Malaysian law. To recapitulate, the respondents had alleged the appellants were under a duty to act in good faith and honesty in granting and to administer the D drawdown of the loan facility to the plaintiff for the sole purpose of the completion of the construction of the revised project, and that at all material times, the appellants had breached their duty and legal obligations to the plaintiff. The trial court agreed with the respondents and found such a breach, describing it as a E "tortious liability for breach of duty of good faith and fair dealing" which, according to the court, "has been utilised in the field of lender liability". The court also spoke of the parties to a contract being subject to "an implied duty to do all that is reasonably necessary to secure performance of the contract" and that F "[n]either party may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit." Quite apart from a breach of fiduciary obligation (which was unpleaded), the court based its decision on tort, contract and a somewhat more ambulatory "duty as a banker". It G is apparent from a reading of the judgment of the trial court that the American law was considered, and was instrumental in providing the basis for the trial court's decision. The paramount question is therefore whether this basis represents the common law as applicable in Malaysia.

H **[315]** I feel doctrines and principles derived from foreign jurisdictions, in this particular instance, United States of America, although attractive and entitled to respect, can only be evaluated within the confines of our Civil Law Act 1956. That is our governing legislation on reception of the common law, and I tend I

to agree with the submission by the appellants that our courts have obviously to apply, in banking matters, the common law of England. To quote the relevant s. 5(1) of the Act, in all questions and issues relating to, *inter alia*, "banks and banking", "the law to be administered (in the States of West Malaysia) shall be the same as would be administered in England in the like case at the date of coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law." By s. 5(2), in the States of Malacca, Penang, Sabah and Sarawak, the same formula applies with a variation in that "the law to be administered shall be the same as would be administered in England, in the like case **at the corresponding period** ..." (emphasis added) The next obvious question must be whether the duty of good faith and honesty/fair dealing exists in English law, be it in tort or contract?

[316] *Chitty on Contracts* and *Walford v. Miles* [1992] 2 AC 128, have been cited before us that English common law does not recognise any general duty of good faith in commercial matters. *Walford v. Miles* is cited to even establish that "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations" and that a duty to negotiate in good faith is unworkable in practice.

[317] I should add however, the principles in *Walford v. Miles* is more relevant in the context of a duty to negotiate in good faith, whereas in this appeal we are addressing the area described generically as "good faith performance". A case can be made to treat "good faith performance" somewhat separately, since even at common law there could be an implied duty to do all that is reasonably necessary to secure performance of the contract or not to injure the right of the other party to receive a proposed benefit. James O'Donovan's *Lender Liability (LBC Information Services; 2000)* when addressing the Anglo-Australian position on this point comments thus:

> In contrast with the courts' reluctance to imply a duty to negotiate in good faith, there is a general contractual rule that each party "agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract". It follows that the parties to a contract are subject to an implied duty to do all that is reasonably necessary to secure

> performance of the contract. Neither party may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit."(see page 36, para 1.170 of the commentary)

[318] This view of the learned author lends some support to the position adopted by the High Court, but as will be seen below, even this learned author qualifies this initial premise when viewed in the context of a commercial loan transaction.

[319] The Court of Appeal of Singapore decision in *Ng Giap Hon v. Westcomb Securities Pte Ltd and Others* [2009] 3 SLR 518 is a persuasive authority containing a timely caution not "to even attempt to apply it in the practical sphere" on the basis that "the theoretical foundations as well as the structure of this doctrine" have yet to settle, the law being still in a state of flux.

[320] Since the decisions in *Walford v. Miles* and *Ng Giap Hon v. Westcomb Securities*, *supra*, however, the English High Court in *Yam Seng Pte Limited (A company registered in Singapore) v. International Trade Corporation Limited* [2013] EWHC 111(QB), as recently had the occasion to deal at length with this doctrine of good faith performance, and has qualified the stringency of *Walford v. Miles*. It has to be added for proper perspective to be taken that *Yam Seng Pte Ltd* is not a case on banking, it being a case on a breach of a distributorship agreement between the immediate parties, and consequently the elaboration of the law in this most recent decision is demonstrated on the more general level of commercial transactions. Leggatt J, in a comprehensive analysis of English law appears to accept the relevance of a duty of good faith in the context of contractual execution and performance but by contractual implication in the particular circumstances of the case, not an overarching general duty of good faith. Nevertheless, the High Court referred to *Walford v. Miles* as an authority which is limited to the negotiation stage. Justice Leggatt, in reviewing the law, states:

> As pleaded in the Particulars of Claim, it is *Yam Seng*'s case that there was an implied term of the Agreement that the parties would deal with each other in good faith.
>
> The subject of whether English law does or should recognise a general duty to perform contracts in good faith is one on which a large body of academic literature exists. However, I am not aware of any decision of an English Court, and none was cited to me, in which the question has been considered in any depth.

The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application: see *Chitty on Contract Law* (31st Ed.), Vol. 1, para 1-039. In this regard the following observations of Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439 are often quoted:

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.

Another case sometimes cited for the proposition that English contract law does not recognise a duty of good faith is *Walford v. Miles* [1992] 2 AC 128, where the House of Lords considered that a duty to negotiate in good faith is "inherently repugnant to the adversarial position of the parties when involved in negotiations" and "unworkable in practice" (per Lord Ackner at p. 138). That case was concerned, however, with the position of negotiating parties and not with the duties of parties who have entered into a contract and thereby undertaken obligations to each other ...

In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the *Interfoto* case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems - including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation ...

[321] As the above excerpt from the judgment will show, the willingness to expand the doctrine of good faith is influenced by EU legal considerations. Justice Leggatt concludes on a note which argues that there is nothing "novel or foreign" in incorporating the doctrine of good faith in English commercial law:

> Understood in the way I have described, there is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts. It is consonant with the theme identified by Lord Steyn as running through our law of contract that reasonable expectations must be protected: see *First Energy (UK) Ltd v. Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, 196; and (1997) 113 LQR 433. Moreover such a concept is, I believe, already reflected in several lines of authority that are well established. One example is the body of cases already mentioned in which duties of cooperation in the performance of the contract have been implied. Another consists of the authorities which show that a power conferred by a contract on one party to make decisions which affect them both must be exercised honestly and in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally): see e.g. *Abu Dhabi National Tanker Co v. Product Star Shipping Ltd (The "Product Star")* [1993] 1 Lloyd's Rep 397, 404; *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558, 575-7 ...

[322] Given the current stage in the development of the common law, I, for one, am of the view that it will be unwise to simply dismiss in totality the existence of a duty of good faith and fair dealing in contractual relationships. However, some major qualifications have to be factored in. If it is to be taken simply as an implied contractual duty to act in good faith, "to come clean" or "to play fair" or generally to act with honesty in the performance of a contract, which implication is to be derived by construction of the particular contract against its contractual background and context, it can be applied in a practical sense, as indeed was the case on the facts of *Yam Seng Pte Ltd.*

[323] For completeness, it is noteworthy that *Yam Seng Pte Ltd* has been referred to in a subsequent English Court of Appeal case, namely *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (Trading as Medirest)* [2013] EWCA Civ 200, where the English Court of Appeal clarified further the

holding in the former case. Lord Justice Jackson, in alluding to *Yam Seng Pte Ltd*, reiterated the position that "there is no general doctrine of "good faith" in English contract law", but added "although a duty of good faith is implied as an incident of certain categories of contract". Lord Justice Jackson went so far as to hold that if it was intended to impose such a general duty of good faith, the parties must provide for it expressly. Lord Justice Beatson, however, explained *Yam Seng Pte Ltd* as a case where the court implied the duty of good faith, adding "what good faith requires is sensitive to context" and "is established through a process of construction of the contract."

[324] I quote the relevant passages of the Court of Appeal judgment below:

> In addressing this question, I start by reminding myself that there is no general doctrine of "good faith" in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: see *Horkulak* at paragraph 30 and *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB) at paragraphs 120-131. If the parties wish to impose such a duty they must do so expressly." (Lord Justice Jackson at paragraph 105 of the reported judgment).
>
> The recent decision in *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB), decided since the judge's decision, was relied on by Mr Howe QC. In that case, Leggatt J gave extensive consideration to the question of implying a duty of good faith into a contract. His discussion emphasised that "what good faith requires is sensitive to context", that the test of good faith is objective in the sense that it depends on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people, and that its content "is established through a process of construction of the contract ..." (Lord Justice Beatson at paragraph 150 of the judgment).

[325] Having said that, and turning again to the basis for the trial judge's decision, I do not really believe even *Yam Seng Pte Ltd* can, with respect, cure the juridical error of the trial court when the court relied substantively on American law and the UCC to conclude as the court did. On the state of the current law, there is no general duty of good faith and fair dealing at common law. We simply do not have the equivalent of s. 1-201, s. 1-203 of the US Uniform Commercial Code, or s. 205 of the Restatement (Second) of Contracts.

[326] It might be appropriate to note the following commentary in O'Donovan, *Lender Liability*, which was referred to earlier in another context:

> The obligation of good faith and fair dealing has attracted a fusillade of criticism because of the seemingly inconsistent and unpredictable results which courts reach in enforcing the obligation. Perhaps the most trenchant criticism has been directed at cases in which courts have used the obligation to justify injecting their own notions of fairness and decency as implied terms in parties' contract. *Some commentators have even called for the abolition of the obligation in relation to commercial loan transactions because it is inconsistent with the parties' expectations and agreement*." (at page 23 of the commentary) (emphasis added)

[327] I am therefore inclined to even allow this appeal on this ground of misapplication of the relevant law.

[328] The relevant law on the facts of this appeal must surely be what is the duty of good faith and fair dealing in a banker-customer relationship in a loan transaction scenario? Can the duty of good faith and fair dealing be readily implied as a matter of contractual construction against this particular contractual context?

[329] Absent any peculiar special relationship between lender and borrower, a borrower-lender relationship in a banking transaction, noted for very detailed and precise terms (invariably drafted and vetted by lawyers for both sides) being incorporated in the contract document, cannot with respect be a suitable subject matter to interpose any general obligation of good faith and fair dealing. The twin requirements of certainty and predictability in banking transactions have to be accorded primacy consistent with commercial needs and sensibilities. In my view, the banking industry is best guided, and its continuing growth secured, when disputes between parties can be resolved by reference to the actual written terms and conditions in the contract documents, without interposing them with an overarching and uncertain perceived equitable obligation of good faith and fair dealing. In this connection, the cases supporting the position that in an ordinary borrower-lender relationship there cannot be a fiduciary relationship again become very relevant. The cases have been referred to earlier, and again it is not necessary to repeat them here.

[330] As for the requirement and benefit of commercial certainty, it might be of relevance to note what was said by Lord Hoffman in *Union Eagle Ltd v. Golden Achievement* [1997] AC 514:

> The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority ... but also upon considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty.

[331] Something must now be said with respect to the several cases cited by the respondents, in particular *Abdul Rahim Abdul Hamid v. Perdana Merchant Bankers Bhd*, *supra*.

[332] *Abdul Rahim Abdul Hamid v. Perdana Merchant Bankers Bhd* is not an authority on a general obligation of good faith and fair dealing, and therefore is not very relevant on the facts of this appeal. There the issue was misrepresentation by the Bank in the course of negotiation. The bank had represented there would be two drawdowns, but in the loan agreement only one drawdown was included.

[333] As for *Perwira Habib Bank Malaysia Berhad v. Hong Huat Holdings*, *Kluang Wood Products Sdn Bhd v. Hong Leong Finance Bhd & Anor* and *Bumiputra-Commerce Bank Berhad, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors*, *supra*, they too do not concern the obligation to act in good faith and fair dealing. These are all cases where the banks were in breach of clear contractual obligations for which they were held liable. In *Perwira Habib Bank Malaysia Berhad v. Hong Huat Holdings*, for example, the bank had promised to provide end-financing facilities as well as a bridging loan for a project; it did not provide the contract for end-financing. In *Kluang Wood Products Sdn Bhd v. Hong Leong Finance*, this was again a case of a representation by the Bank that end-financing would be made available together with the bridging loan. In *Kuala Terengganu v. Chendering Development Sdn Bhd & Ors*, the Bank had

terminated the overdraft facility given to the customer on the ground of failure to service interest during the bridging period when contractually no interest was payable during that period. Thus, these are ordinary cases of breaches of terms and conditions in the loan contract, or of a clear misrepresentation, not breaches of an obligation of good faith as a cause of action.

[334] I now proceed to evaluate the trial judge's findings on the evidence, mindful always that findings of a trial judge on specific facts based on the credibility of witnesses should not be lightly disturbed. On the facts of this appeal, this constraint is of lesser significance for the findings and conclusions of the trial judge are being questioned not so much as findings of primary facts on the credibility of the evidence, but more on the inferences drawn by the trial judge from the evidence. The present appeal therefore concerns findings of facts "which depend upon inferences drawn from other facts". (See *Abdul Rahim Abdul Rahim & Ors v. Perdana Merchant Bankers & Ors*, *supra*; *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545).

[335] The relevant findings and conclusions of the trial judge as well as the submissions of the parties in this appeal, have been addressed in some detail in the earlier part of this judgment. The trial judge had drawn an inference that the appellants had engineered a default and did not hold up to their part of the bargain based, in a large part, on the significance of the internal memorandum (P28) which stated that that Aseambankers was unwilling to lend further to Shencourt because this bank was over-exposed to the broad property sector. When the trial court concluded on this evidence that this indicated all the lenders were unable to allow further drawdown and therefore engineered a default to hide their in capacity to lend further, this finding, with respect, becomes wholly untenable. It would appear that the trial court was unduly swayed by the circumstances leading to the adduction of this document as evidence, such as the witness (PW4) had to be subpoenaed to come to court, and his presence in court secured only upon a threat of contempt proceedings. She concluded Aseambankers was "at pains to downplay the significance of the internal memorandum" and found the conduct of PW4 evasive "at best" and "downright unreliable at worst",

and found the authenticity of the document established. The trial court then inferred that the lenders had "motives" in not providing financing to Shencourt which, according to the court, "now puts the jigsaw of missing parts of the defendant's incomprehensible conduct, into place." This inference of wrongful conduct on the part of the lenders, when evaluated against the entirety of the evidence, can be legitimately questioned. The circumstances in which the internal memorandum came into the possession of PW1 (Lee) are highly suspect ("... somebody had mistakenly put it in my file ...", testified PW1). The most senior officer of Aseambankers who testified (DW3), said the document did not exist in the files of the bank, and in any event it was an incomplete document, without the signature of Rozidin. These are all factors which would militate against attaching inordinate weight to the document. In any event, the fact remains that notwithstanding what was said in the internal memorandum, there were further indulgences and advances given by the syndicated lenders. On the totality of the evidence, when properly evaluated and weighed, there is no plausible evidence to support a finding of a malicious and conscious engineering of a default and a malicious mismanagement of the facilities to force the respondent into a tight financial corner so that the banks could then enter into an unethical banking arrangement to share the profits of the project. With respect, the probabilities on the evidence to lead to such a far-reaching conclusion are simply absent when the evidence is critically assessed as a whole and against the contemporaneous documents. I therefore tend to agree with the submission of appellants' counsel who rightly said the banks could have just walked away from the project and sued the respondents in 1999, or even 2000, when Shencourt started defaulting in interest payment, but they chose to still continue to support the project, injected more funds and granted generous indulgences. Yet, with the decision of the High Court, Shencourt has been allowed instead to walk away with the project without any borrowing and with all securities discharged, to include the encumbrance on the project land. To add salt to wound, as aptly described by counsel, the banks have now to additionally pay for LAD to Shencourt's end-purchasers.

[336] The real test of default should properly be assessed against the contract documents. The relevant provisions have also been analysed fairly extensively earlier. Again, I do not propose to repeat them here. I am persuaded by the appellants' submission that these express provisions do allow the disputed redemption payments to be credited to the principal sum and not to interest, for the fixed deposits of RM2,000,000 to be earmarked as further security only to cover the indebtedness owing to Alliance, and for the DSRA to be maintained with a cushion of six months' interest payments at all times. The appellants cannot be faulted for acting in accordance with the express contractual terms and conditions since these have obviously been negotiated and agreed between the parties. In these circumstances, there can be no scope for any notion of "legitimate contractual expectation", as contended by the respondents, with its attendant uncertainties.

[337] Thus, I am in favour of allowing this appeal on the ground of error in the application of correct law in relation to the duty of good faith and fair dealing, and error in relation to findings of conscious mismanagement and malicious engineering of a default allegedly in breach of such duty of good faith and fair dealing, which findings are not supported by plausible evidence. Further, this decision of the High Court cannot be sustained in view of the two concessions of counsel for the respondents referred to earlier. First, it is conceded the issue of fiduciary relationship was not pleaded. Secondly, it is conceded the loan amounts can be considered as the stage of assessment of damages. This second concession is, in my view, a tacit recognition that the principle established by the Supreme Court in *Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495 applies. A bank's claim for the recovery of a loan is an entirely separate matter from any claim against the bank for damages. See the following passage:

> The Bank's claim for recovery of the loan was entirely a separate matter from the 1st Respondent's claim for damages against the Bank. There is no ground in law for exempting the 1st Respondent from liability to repay the loan ... (at p. 505 of the Report)

Conclusion

[338] I am therefore in favour of allowing this appeal with costs. The judgment of the High Court is to be set aside. Consequently, judgment is to be recorded for the appellants in terms as updated by DW3 and as ordered by my learned brother Abdul Malik bin Ishak, JCA in regard to Suit No: D2-22-443-2006. The deposit is to be refunded to the appellants. Costs of RM120,000 here and below to be paid by the respondents to the appellants.